No. 92-593-ATX Title: Miguel De Grandy, et al., Appellants
v.
Bolley Johnson, Speaker of the Florida House of Representatives, et al.

Docketed:
September 29, 1992 Court: United States District Court
for the Northern District of Florida

Vide:
92-519
92-767

See also:
92-519
92-767

Entry	Date	Proceedings and Orders
	Sep 29 1992	Statement as to jurisdiction filed.
	Oct 8 1992	Order extending time to file response to jurisdictional statement until November 30, 1992.
	Oct 8 1992	Order granted extending time to file consolidated response to jurisdictional statement to and including November 27, 1992.
	Oct 30 1992	Order extending time for all appellees to file consolidated responses to jurisdictional statements to and including December 31, 1992.
	Dec 29 1992	Extension of time granted to file consolidated response to jurisdictional statement extended further to and including January 7, 1993.
	Dec 29 1992	Motion of appellees T.K. Wetherell, et al. to dismiss or affirm filed. VIDED.
	Jan 6 1993	DISTRIBUTED. February 19, 1993
	Jan 7 1993	Brief of appellee Florida State NAACP to affirm in part and vacate in part filed. VIDED.
	Feb 22 1993	PROBABLE JURISDICTION NOTED. The case is consolidated with No. 92-519, Wetherell v. De Grandy, and No. 92-767, United States v. Florida, and a total of one hour is allotted for oral argument.
		**********
	Mar 16 1993	Order extending time to file brief of appellant on the merits until April 21, 1993.
	Mar 22 1993	Appellees' briefs are due June 1, 1993.
	Apr 20 1993	Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae in No. 92-519 filed.
	Apr 21 1993	Brief amicus curiae of Anti-Defamation League of B'Nai B'Rith filed. VIDED.
	Apr 21 1993	Brief of appellant United States filed. VIDED.
	Apr 21 1993	Brief of appellants Miguel De Grandy, et al. filed.
	Apr 23 1993	Joint appendix filed. VIDED.
	May 7 1993	Motion of of the Acting Solicitor General for divided argument filed.
	May 7 1993	Motion of appellants in No. 92-519 and appellees in No. 92-593 and No. 92-719 for divided argument filed.
	May 24 1993	Motion of American Jewish Congress, et al. for leave to file a brief as amici curiae in No. 92-519 GRANTED.

No. 92-593-ATX

Entry	Date	Proceedings and Orders
	May 24 1993	REDISTRIBUTED. May 28, 1993
	May 25 1993	Record filed.
	May 28 1993	Brief of appellee Florida State Conference of NAACP Branches filed. VIDED.
	Jun 1 1993	Motion of of the Acting Solicitor General for divided argument GRANTED. in part. A total of 30 minutes for oral argument is allotted to the Acting Solicitor Genreal and a total of 15 minutes for oral argument is allotted to the De Grandy plaintiffs. The motion of Florida and the state officials for divided argument is denied. A total of 45 minutes for oral argument is allotted to Florida and the state officials.
	Jun 1 1993	Brief amici curiae of Grant Woods, Attorney General of Arizona, et al. filed. VIDED.
	Jun 1 1993	Brief of appellees filed. VIDED.
	Jul 6 1993	Reply brief of appellant United States filed. VIDED.
	Jul 7 1993	Reply brief of appellants Miguel DeGrandy, et al. filed.
	Aug 2 1993	CIRCULATED.
	Aug 16 1993	SET FOR ARGUMENT MONDAY, OCTOBER 4, 1993. (3RD CASE).
	Oct 4 1993	ARGUED.

No. 92-393

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Supreme Court, U.S.
FILED
SEP 29 1992
OFFICE OF THE CLERK

MIGUEL DE GRANDY, et al.

Appellants,

v.

T. K. WETHERELL, et al.

Appellees.

On Appeal From The United States District Court
For The Northern District Of Florida
Tallahassee Division

JURISDICTIONAL STATEMENT AND APPENDIX

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
Patton, Boggs & Blow
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
Rumberger, Kirk & Caldwell
P.O. Box 10507
Tallahassee, FL 32302
(902) 222-6550

Alberto R. Cardenas
Ferrell, Cardenas, Fertel & Morales
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
***Counsel of Record**

Questions Presented

I. **Upon a finding of a violation of Section 2 of the Voting Rights Act, can a district court decline to provide for a complete remedy of that violation?**

II. **Upon establishing liability under Section 2 of the Voting Rights Act, what remedial procedure and standards should a district court employ to insure Fourteenth and Fifteenth Amendment guarantees are not eviscerated by deference to state redistricting policies?**

Parties To The Proceeding

The appellants are: Miguel De Grandy, Mario Diaz-Balart, Andy Ireland, Casimer Smericki, Van B. Poole, Terry Ketchel, Roberto Casas, Rodolfo Garcia, Jr., Luis Rojas, Lincoln Diaz-Balart, Javier Souto, Justo Luis Poso, Alberto Cardenas, Rey Velazquez, Luis Morse, Alberto Gutman, Karen E. Butler, Sgt. Augusta Carter, Jean Van Meter, Anna M. Pinellas, Robert Woody, Gina Hahn, Bill Petersen, Terry Kester, Margie Kincaid, and Brooks White. The appellees are: T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Gwen Margolis, in her official capacity as President of the Florida Senate, Lawton Chiles, in his official capacity as Governor of the State of Florida, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee, Jim Smith, in his official capacity as Secretary of State of Florida and Robert Butterworth, in his official capacity as Attorney General of Florida.

In the consolidated case of Florida State Conference of NAACP Branches, et al. v. Chiles, No. 92-40131-WS, the plaintiffs were: Florida State Conference of NAACP Branches, T.H. Poole, Sr., Whitfield Jenkins, Leon W. Russell, Willye Dennis, Turner Clayton, Rufus Brooks, Victor Hart, Kerna Iles, Roosevelt Walters, Johnnie McMillian, Phyllis Berry, Mary A. Pearson, Mable Butler, Iris Wilson, Jeff Whigham, Al Davis, Peggy Demon, Carlton Moore, Richard Powell, Neil Adams, Leslie Mcdermott, Robert Saunders, Sr., Irv Minney, Ada Moore, Anita Davis, and Calvin Barnes. The defendants were: Lawton Chiles, in his official capacity as Governor of Florida, Jim Smith, in his official capacity as Secretary of

State of Florida, Robert Butterworth, in his official capacity as Attorney General of Florida, Gwen Margolis, in her official capacity as President of the Florida Senate, T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, and Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee.

In the consolidated case of United States v. Florida, No. 92-40220-WS, the plaintiff was the United States of America, and the defendants were: State of Florida, T.K. Wetherell, Speaker of the Florida House of Representatives; Gwen Margolis, President of the Florida Senate; Lawton Chiles, Governor of the State of Florida; Robert Butterworth, Attorney General for the State of Florida; Peter R. Wallace, Chairman of the House Reapportionment Committee; Jack Gordon, Chairman of the Senate Reapportionment Committee; and Jim Smith, Secretary of State for the State of Florida.

The court below also granted the following persons and organizations leave to intervene or act as amicus curiae: Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; the Cuban American Bar Association; the Coalition of Hispanic Women; and Daniel Webster. Plaintiff-intervenors include Gwen Humphrey, Vivian Kelly, Gene Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. William; State Representatives Darryl Reaves, Corinne Brown and James T. Hargrett; United States Representative Jim Bacchus; and United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

Cross appeals have been filed by the following parties: T.K. Wetherell, Peter R. Wallace, Lawton Chiles, Jim Smith, Robert Butterworth, the State of Florida, the United States of America and the Florida State Senate.

Table Of Contents

	Page
Questions Presented	i
Parties To The Proceeding	ii
Opinions Below	1
Jurisdiction	1
Constitutional And Statutory Provisions Involved	1
Statement Of The Case	2
Conclusion	28

Table Of Authorities

Page

Cases

Allen v. State Board of Elections,
393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1
(1969) 14

Bullock v. Weiser,
404 U.S. 1065, 92 S.Ct. 750, 30 L.Ed.2d
752 (1972) 27

Burns v. Richardson,
384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376
(1966) 22

Campos v. Houston,
776 F. Supp. 304 (S.D. Tex. 1991) 27

Campos v. Houston,
___ U.S. ___, 112 S.Ct. 354
(Scalia Cir. Justice) (Oct. 29, 1991) 27

Chapman v. Meier,
420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766
(1975) 22

Chisom v. Roemer,
853 F.2d 1186 (5th Cir. 1988) 25

Chisom v. Roemer,
___ U.S. ___, 111 S.Ct. 2354 (1991) . . 13, 14

Connor v. Finch,
431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465
(1977) 22

DeBaca v. County of San Diego,
___ F. Supp. ___, 1992 W.L. 114049
(S.D. Cal. May 11, 1992) 19, 20

Dickinson v. Indiana State Election Bd.,
933 F.2d 497 (7th Cir. 1991) 24

Dillard v. Crenshaw County,
640 F. Supp. 1347 (M.D. Ala. 1986) 26

Dillard v. Crenshaw County,
831 F.2d 246 (11th Cir. 1987) 15

Florida State Conference of NAACP Branches, et al.
v. Chiles, No. 92-40131-WS ii

Gaffney v. Cummings,
412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298
(1973) 22

Gingles v. Edmisten,
590 F. Supp. 345 (E.D.N.C.), aff'd
in part and reversed in part sub
nom., Thornburg v. Gingles, 478 U.S.
30 (1986) 18, 24

Harris v. Graddick,
593 F. Supp. 128 (M.D. Ala. 1984) 26

In re Constitutionality of Senate Joint Resolution 2-G Special Apportionment Session 1992, No. 79-674, slip op. (Fla. May 13, 1992) 5, 7

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), cert. denied sub nom., City Council of the City of Chicago v. Ketchum, 471 U.S. 1135 (1985) 24

Kilgarlin v. Martin, 252 F.Supp. 404 (S.D. Tex. 1966), rev'd in part and remanded sub nom., Kilgarlin v. Hill, 386 U.S. 120 (1967) 3

Louisiana v. United States, 380 U.S. 145, 154 (1965) 15

Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988) 25

McDaniels v. Mehfoud, 702 F. Supp. 588 (E.D. Va. 1988) 24

Meek v. Metropolitan Dade County, No. 86-1820-CIV-G (S.D. Fla. August 14, 1992) 16, 24

Reynolds v. Sims, 377 U.S. 533, reh'g denied, 379 U.S. 870 (1964) 17, 26

South Carolina v. Katzenbach,
383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966) 13

Tallahassee Branch of NAACP v. Leon County,
827 F.2d 1436 (11th Cir. 1987), cert. denied, 488 U.S. 960 (1988) 24

Thornburg v. Gingles,
478 U.S. 30 (1986) 10, 11, 16, 19, 20

United States v. Florida, et al.,
TCA 92-40220-WS 6

United States v. Florida,
No. 92-40220-WS iii

Upham v. Seamon,
456 U.S. 37 (1982) 12, 15, 27

Washington v. Tensas Parish School Board,
819 F.2d 609 (5th Cir. 1987) 24

Watkins v. Mabus,
771 F. Supp. 789 (S.D. Miss.), aff'd in part, vacated in part, ___ U.S. ___, 112 S.Ct. 412 (1991) 28

Whitcomb v. Chavis,
396 U.S. 1055, 90 S.Ct. 748, 24 L.Ed.2d 757 (1970) 27

White v. Weiser,
412 U.S. 783 (1973) 12, 21, 24

Wise v. Lipscomb,
437 U.S. 535 (1978) 23, 25

Zimmer v. McKeithen,
485 F.2d 1297 (5th Cir. 1973) 21

Statutes

28 C.F.R. Part 51 (1991) 5

28 U.S.C. § 1253 1

28 U.S.C. § 2284 2

42 U.S.C. § 1973 et seq. . . . . passim

Article III, Section 16 of
the Constitution of
the State of Florida 1, 3

Fed. R. Civ. P. 53 3

Other

"Application of Voting Rights Act to Communities
Containing Two or More Minority Groups --
When Is the Whole Greater than the Sum of
the Parts?", 20 Tex. Tech. L. Rev. 95 (1989) 16

Co. Lit. 197, b, 1 Thomas's Coke, 902 13

S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982)
reprinted in 1982 U.S. Code Cong. &
Admin. News 208 11

Opinions Below

The July 2 judgment and July 17, 1992, opinion of the three-judge court for the Northern District of Florida, Tallahassee Division, which implemented redistricting of the state legislative districts in Florida, are unreported. Each appears in the Appendix hereto.

Jurisdiction

The judgment and order of the three-judge court for the Northern District of Florida, Tallahassee Division, were entered on July 2, 1992, and July 17, 1992, respectively. Appellants (hereinafter the "De Grandy appellants") filed notice of appeal on July 31, 1992. See App. 98.

This appeal is docketed in this Court within 60 days after the filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

Constitutional And Statutory Provisions Involved

The constitutional and statutory provisions involved in the case are Article I, Section 2 of, and the First, Thirteenth, Fourteenth and Fifteenth Amendments to, the Constitution of the United States, Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, and Article III, Section 16 of the Constitution of the State of Florida, the pertinent texts of which are set out in the Appendix.

Statement Of The Case

On January 14, 1992, Miguel De Grandy, an Hispanic member of the Florida House of Representatives, and other registered voters (the "De Grandy appellants") filed a complaint in the District Court for the Northern District of Florida, Tallahassee Division, challenging the validity of Florida's congressional and state legislative districts. The De Grandy appellants alleged that the then-existing districts violated both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq., and urged the court to redistrict and reapportion the state. The court, however, declined to take preliminary action, giving the Florida legislature an opportunity to adopt redistricting plans.

Subsequently, the De Grandy appellants amended their original complaint and alleged specific violations of the Equal Protection Clause (the "one-person, one-vote" principle) and of the Fifteenth Amendment to the United States Constitution.[1] The plaintiffs also alleged violations of Sections 2 and 5 of the Voting Rights Act because the

[1] The parties stipulated to malapportionment of the districts existing at the time of the commencement of this action. According to the 1990 census the total population of the state of Florida was 12,937,926 persons, an increase of 3,213,602 persons since 1980. To achieve equal population districts in the forty member Senate, each district would ideally contain 323,448 persons. To achieve equal population districts in the one hundred twenty member House, each district would ideally contain 107,816 persons.

districts diluted the voting strength of Hispanic voters. On March 27, 1992, a three-judge court was convened to hear the challenge, pursuant to 28 U.S.C. § 2284.

The Florida legislature began its regular session on January 14, 1992; the session ended on March 13, 1992, without adopting a state reapportionment plan.[2] On March 27, 1992, pursuant to a renewed motion by the De Grandy appellants, the three-judge panel exercised jurisdiction and issued a scheduling order. See App. 12. Consequently, on April 2, 1992, the Governor of Florida called a special redistricting and reapportionment[3] session of the Florida

[2] Under the Constitution of the State of Florida, if the legislature fails to apportion legislative districts within two years of each federal decennial census, the governor is required to convene a special apportionment session of the legislature, and it is the "mandatory duty" of the legislature to adopt a joint resolution of apportionment. Fla. Const. Art. III, § 16(a). See App. 106. The constitution further requires the state attorney general to petition the Florida Supreme Court for a declaratory judgment determining the validity of the apportionment plan. Id. If the Supreme Court determines that the legislative apportionment is valid, the plan must be precleared by the Department of Justice pursuant to 42 U.S.C. § 1973(c) (Section 5 of the Voting Rights Act) before it may be implemented.

[3] The term "reapportionment" properly refers to the redistribution of seats in established units of government such as the United States House of Representatives. "Redistricting" signifies line-drawing to establish new districts within these units. Kilgarlin v. Martin, 252 F.Supp. 404, 410 n.1 (S.D. Tex. 1966), rev'd in part and

Legislature pursuant to Article III, § 16(a), of the Florida Constitution.

On April 6, 1992, pursuant to Fed. R. Civ. P. 53 the court appointed U.S. District Judge C. Clyde Atkins as special master for both congressional and legislative reapportionment. On April 7, 1992, the court consolidated this case with a similar lawsuit filed by the Florida State Conference of NAACP Branches and individual African-American voters. The court ordered bifurcation of the congressional redistricting and state reapportionment hearings.[4] On April 10, 1992, the legislature adopted

---

remanded sub nom., Kilgarlin v. Hill, 386 U.S. 120 (1967). Because the Constitution of Florida, Article III, Section 16(a) permits the legislature to change the number (within a range) of house and senate seats after each decennial census, it is technically appropriate to refer to the Florida redistricting process as "reapportionment." This term is used throughout this Jurisdictional Statement for purposes of consistency with the District Court opinion.

[4] Judge Atkins concluded hearings on congressional redistricting and issued his report and recommendation. The district court considered the parties objections, conducted a hearing and issued its judgment on May 29, 1992. These appellants raise no issue for appellate review with respect to the May 29, 1992 judgment.

On the basis of the evidence adduced during the congressional hearings, Judge Atkins recommended, and the court below adopted, a congressional plan which created two Hispanic majority districts (with 67.5% Hispanic voting age population ("HVAP") and 70.6%

Senate Joint Resolution 2-G (hereinafter "SJR 2-G") reapportioning state House and Senate districts.

On April 17, 1992, the Attorney General of the State of Florida submitted SJR 2-G concerning state legislative reapportionment to the United States Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act.

On May 13, 1992, the Florida Supreme Court validated SJR 2-G, subject to the right of an interested party to file a challenge under Section 2 of the Voting Rights Act in Florida state court. See In re Constitutionality of Senate Joint Resolution 2-G Special Apportionment Session 1992, No. 79-674, slip op. (Fla. May 13, 1992). As a result of the validation and pending the Section 5 preclearance process, the district court stayed state reapportionment proceedings including hearings scheduled by the special master regarding state reapportionment until May 27, 1992. See App. 13.

On June 16, 1992, the Attorney General of the United States precleared the Florida House of Representatives redistricting plan, but refused to preclear the Senate plan with regard to the Hillsborough County area.[5]

HVAP, respectively) and two black majority districts (with 54.0% black voting age population ("BVAP") and 50.6% BVAP, respectively).

[5] Five Florida counties are subject to the preclearance requirements of Section 5: Collier, Hardee, Hendry, Hillsborough and Monroe. See Appendix to 28 C.F.R. Part 51 (1991). The letter of the Attorney General specifi-

On June 17, 1992, the Florida Supreme Court requested the legislature to adopt a reapportionment plan, taking into consideration the objections of the Justice Department. Its order concluded that: "In the event the Legislature declares its inability to adopt a reapportionment plan or fails to adopt a plan by June 24, 1992, this Court will conclude that a legislative impasse has occurred, and this Court will promptly undertake to make such reapportionment." App. 16. The federal court continued to stay its hand until the state processes reached their conclusion.

On June 18, 1992, Defendant Chiles, Governor, Defendant Wetherell, Speaker of the House and Defendant Margolis, President of the Senate advised the Supreme Court by letters of their decision not to convene an extraordinary apportionment session of the Florida legislature. See App. 16-17. On June 19, 1992, the Florida Supreme Court declared a legislative impasse.

On June 23, 1992, the United States filed suit in the court below[6] against the State of Florida alleging that the State's 1992 legislative redistricting plans diluted the voting strength of African-American citizens in Hillsborough County and in Escambia County and the voting strength of Hispanic citizens in Dade County, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, et seq.

---

cally limited its decision to these five counties and did not address Section 2 violations elsewhere in the state.

[6] United States v. Florida, et al., TCA 92-40220-WS.

On June 25, 1992, the Florida Supreme Court adopted a Senate redistricting plan which complied with the Attorney General's objection to Hillsborough County. See Constitutionality of SJR 2-G, No. 79,674, slip. op. at 5. This action concluded the review by the Florida Supreme Court.

Upon approval of the legislative plans by the Florida Supreme Court, the district court stay was lifted. See App. 16. The De Grandy appellants then filed a third amended complaint, alleging that the 1992 apportionment (SJR 2-G) violated Section 2 of the Voting Rights Act, specifically with regard to Hispanics in Dade County districts in the Senate and House plan.

On June 26, 1992, the court below began hearing the Section 2 challenges,[7] incorporating by reference the evidence which had already been adduced by Judge Atkin's hearings on congressional redistricting. After five days of trial, the court concluded that both the House and Senate plans violated Section 2 in the Dade County area. The court ruled that, "under the totality of the circumstances, the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County." App. 28. The court conducted a remedy phase of the case with regard to the House only and adopted a

---

[7] The court denied the motion of the De Grandy appellants to limit the scope of its consideration to preliminary relief only. See App. 13-14.

modified version of the House plan presented by the De Grandy appellants.[8]

The State Senate redistricting plan enacted by the State of Florida (SJR 2-G) created seven Senate districts in the Dade County area in three of which Hispanics comprise a majority of the voting age population.[9] At trial, the De Grandy appellants proved that the state's plan fragmented the Hispanic community. The De Grandy appellants also proved that if the Dade County area were divided into equally populated Senate districts which follow non-discriminatory plan-drawing criteria, Hispanics would

---

[8] These appellants raise no issue for appellate review with respect to the district court's order concerning reapportionment of the Florida House.

[9] In South Florida, SJR 2-G created five minority-majority Senate districts.

Hispanic Majority Districts

District 34 (Dade)	66.3% HVAP
District 37 (Dade)	64.3% HVAP
District 39 (Dade)	76.1% HVAP

Black Majority Districts

District 36 (Dade)	52.5% BVAP
District 30 (Dade, Broward, Palm Beach)	51.7% BVAP

constitute a voting age majority in one additional Senate district in the Dade County area.[10]

---

[10] In South Florida, Plan 275, submitted by the De Grandy appellants contained four Hispanic voting age population majority districts and two black voting age population majority districts, with the following percentages of the voting age population:

Hispanic Majority Districts

District 33 (Dade)	71.5% HVAP
District 34 (Dade)	66.1% HVAP
District 35 (Dade)	55.0% HVAP
District 40 (Dade)	66.2% HVAP

Black Majority Districts

District 32 (Dade, Broward)	57.1% BVAP
District 36 (Dade)	57.3% BVAP

An alternative plan presented by Plaintiff Reaves, Plan 180, created four Hispanic VAP supermajority districts in which Hispanics constituted the following percentages of the voting age population:

Hispanic Majority Districts

District 33 (Dade)	66.8% HVAP
District 34 (Dade)	65.0% HVAP
District 35 (Dade)	65.7% HVAP
District 40 (Dade)	62.1% HVAP

In analyzing the evidence presented, the district court applied the three-prong test set out in Thornburg v. Gingles, 478 U.S. 30 (1986),[11] as well as the totality of the circumstances analysis outlined in the Senate report and cited favorably in O'Connor's concurring opinion in Gingles. The court concluded that the De Grandy appellants had established a violation of Section 2. App. 67. As a result, the court stated: "We must now fashion a remedy." Id. (emphasis added). However, the district court declined to substitute a remedial plan in place of SJR 2-G and stated in its ruling from the bench:

Black Majority Districts

District 32 (Dade, Broward)	58.8% BVAP
District 36 (Dade)	59.7% BVAP

See App. 70.

[11] The minority group must be able to demonstrate:

1) that it is sufficiently large and geographically compact to constitute a majority in a single member district;
2) that it is politically cohesive; and
3) that the white majority votes sufficiently as a bloc to enable it in the absence of special circumstances, such as the minority candidate running unopposed usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 49-50.

> [T]he plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida. . . . Consequently, under Supreme Court precedent, this court must give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court.

App. 27-28. Immediately after the ruling, the court denied the De Grandy appellants' motion for reconsideration and refused to consider their evidence of a remedy which would create four Hispanic supermajority districts without any regressive effect on black voters.[12]

Following the district court's July 2 judgment, the House defendants applied to Justice Kennedy for a stay, pending their filing of a jurisdictional statement. The application was granted. See Stay Order, No. A-32.

---

[12] Plan 345, prepared by the Senate minority staff director for the De Grandy appellants and submitted to the court in De Grandy's motion for reconsideration, created several additional remedial options for the court, including a plan that would have met the court's "ideal" remedy of four Hispanic minority districts with voting age populations of 65.3%, 64.0%, 60.0% and 69.2% and three black districts with voting age populations of 52.5%, 55.3% and 52.3%.

I. Upon A Finding Of A Violation Of Section 2 Of The Voting Rights Act, Can A District Court Decline To Provide For A Complete Remedy Of That Violation?

A. Introduction.

Appellants seek reversal and remand to require the district court to remedy violations of Section 2 of the Voting Rights Act which it found in the Florida Senate districts in Dade County.

Previously, on motion of the Florida House appellants, this Court entered a stay of the district court's order regarding reapportionment of the state House in the Dade County area.[13] Among the assertions proffered by the House in support of its motion was the contention that the district court, in its remedial phase, violated the clear commands of White v. Weiser, 412 U.S. 783 (1973), and Upham v. Seamon, 456 U.S. 37 (1982), by not affording the state an adequate opportunity to propose a plan to remedy a Section 2 violation. This same argument is advanced in the recently filed Jurisdictional Statement by the House and executive appellants. See pp. 25-27.

In its ruling regarding the state Senate, the district court afforded no opportunity to any party to propose remedial districts. If the defendants' appeal raises a substantial question because they were not afforded an adequate opportunity to propose a remedial plan for the House, the De Grandy appellants' appeal on similar

---

[13] See Application for Stay of Order of Three-Judge United States District Court, No. A-32.

grounds is even more compelling. After announcing a finding of violation of Section 2, the court also announced abruptly, without further hearing, that no remedy was feasible. This conclusion is not only factually erroneous, it is mystifying and extremely unfair. First, the court below did not give appellants the opportunity to address a new remedial requirement that the district court found decisive in denying a remedy. Secondly, the lower court failed to define the contours of the new remedial requirement and why it was not satisfied in this case. Finally, the conclusion that the minority communities' interests are antithetical does not give their legal representatives the opportunity to demonstrate new proposals which may meet the court's concerns.

B. A Finding Of A Section 2 Violation Mandates A Complete Remedy.

The 1982 amendments to Section 2 of the Voting Rights Act were designed to give district courts broad remedial powers. To remedy a Section 2 violation, a court must "exercise its traditional equitable powers to fashion relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982) reprinted in 1982 U.S. Code Cong. & Admin. News 208 (emphasis added). As this Court noted in Chisom v. Roemer, ___ U.S. ___, 111 S.Ct. 2354 (1991):

> Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.' South Carolina v.

> Katzenbach, 383 U.S. 301, 315, 86 S.Ct. 803, 811, 15 L.Ed.2d 769 (1966). In Allen v. State Board of Elections, 393 U.S. 544, 567, 89 S.Ct. 817, 832, 22 L.Ed.2d 1 (1969), we said that the Act should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination.

Id. at ____, 111 S.Ct. at 2368.

Although the court below properly exercised its authority and ordered remedial plans with respect to the Florida House and the Florida congressional delegation, the court failed to provide a remedy for the violation it identified in the State Senate plan.[14] Instead, it concluded that "the ideal remedy for the Section 2 violations in this case is not a viable option." App. 73.

The failure of the court below to enter a remedy for the State Senate leaves in place existing barriers which prevent the election of candidates of choice of both black and Hispanic communities. Failing to remove these barriers

---

[14] "This court is faced with two independent, viable Section 2 claims in South Florida and our remedy must address both of those claims. An ideal solution would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts in South Florida."

App. 73.

constitutes a direct and continuing violation of both the letter and the philosophy of the Voting Rights Act. This remedial philosophy is reflected in sentiments expressed by this Court as well as lower federal courts in numerous civil rights cases. "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). See also Upham v Seamon, 456 U.S. 37, "When an election system is found to be illegally dilutive, as here, the Court has the power to order into effect a new election plan to remedy the violation. The plan adopted by the Court must fully cure the illegal aspects of the current districting scheme." Dillard v. Crenshaw County, 831 F.2d 246, 249 (11th Cir. 1987).

The court below sought to justify its refusal to remedy the violations in reliance upon a perceived need to "give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court." App. 28. Deference to state policy choices is, however, justified only in absence of an affirmative finding of a violation of federal law. In contrast, where the district court undertakes a Section 2 trial and finds a violation -- as in the present case -- deference to state policy choices is overridden by federal guarantees under the Fourteenth and Fifteenth Amendments. "Although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans." Upham v. Seamon, 466 U.S. 35 (1982).

It is axiomatic that for the violation of every right, there must be a remedy. Said Lord Coke: "The law wills

that, in every case where a man is wronged and endangered, he shall have a remedy." Co. Lit. 197, b, 1 Thomas's Coke, 902. The court below correctly found a violation of federal law in the redistricting of the Florida legislature and congress.[15] The court entered remedial plans for the state House and Congress but declined to enter such relief for the state Senate.[16]

The court below documented a violation of the voting rights of blacks and Hispanics, and yet foreclosed a remedy for either group by asserting with finality that any new plan would further infringe on group rights. A court which finds a voting rights violation simply has not completed its task. It must proceed to explore the remedial options that are appropriate under all of the facts and circumstances of a particular case. The Voting Rights Act

---

[15] These appellants take no exception to the court's factual basis for liability. Indeed, findings of fact of a district court, unless clearly erroneous, are binding upon appellate courts on appeal. "We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." Gingles, 478 U.S. at 79. Appellants do, however, challenge the court's determination that no remedy could be imposed, and it is that legal conclusion (and the district court's expressed basis for it) which is the issue in this appeal.

[16] Another U. S. District Court has recently identified the problems associated with pitting Dade County minorities against each other and has provided a remedy. See Meek v. Metropolitan Dade County, No. 86-1820-CIV-G (S.D. Fla. August 14, 1992).

and the Constitution require that such violations be cured for future elections. In the seminal case of Reynolds v. Sims, 377 U.S. 533, reh'g denied, 379 U.S. 870 (1964), this Court used the following language which now applies with equal force to the case at bar:

> It is enough to say now that once a . . . legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.

377 U.S. at 585.

There are no unusual facts or exigent circumstances which would justify the imposition of an election plan for the state Senate which has been judicially determined to be unlawful.[17] The Voting Rights Act was crafted to remedy violations, not just to identify them. Therefore, this Court should reverse and remand for further remedial action.

---

[17] Indeed, the De Grandy appellants proffered a plan which would remedy the violation without impinging upon the remedial rights of the black voters who also proved violations of Section 2. The court below improperly refused to consider this evidence. See n.____, supra, and accompanying text.

II. Upon Establishing Liability Under Section 2 Of The Voting Rights Act, What Remedial Procedure And Standards Should A District Court Employ To Insure Fourteenth and Fifteenth Amendment Guarantees Are Not Eviscerated By Deference To State Redistricting Policies?

A. Introduction.

The district court's approach to the remedy of violations found in the Senate plan presents a substantial question warranting plenary consideration or summary reversal and remand. The approach raises a substantial issue of concern not only to the citizens of Florida, but also to voters in the many other large states in which multiple minority communities exist in close geographic proximity. This Court now has the opportunity to address this issue which is associated with the proper conduct of the remedial phase of a section 2 trial where the voting rights of more than one minority group must be considered. District courts need guidance to insure that the federal guarantees of voting equity for protected classes encompassed in the Voting Rights Act are not eviscerated by deference to racially unfair state policies.

Traditionally, district courts have conducted a two stage Section 2 proceeding -- liability and remedy. See, e.g., Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C.), aff'd in part and reversed in part sub nom., Thornburg v. Gingles, 478 U.S. 30 (1986). In contrast, the district court's Senate decision combined both phases. This approach gave the parties no opportunity to respond to the court's perception that the plans offered by the minority communities during the liability phase were mutually exclusive.

B. The District Court Introduced A New Evidentiary Burden Without Allowing The Parties An Opportunity To Meet The New Standard.

In reaching its judgment, the court imposed an additional, previously unannounced threshold requirement on minority plaintiffs not present in statutory or case law. The lower court ruled from the bench:

> The plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida.

Tr. VIII-53. App. 27-28.

This entirely new evidentiary burden announced by the district court requires a minority plaintiff to prove not only voter polarization, sufficient geographic compactness and cohesiveness, but also that its proposed plans will not adversely effect other minority groups. The proposition -- that a remedial plan must not have an adverse effect on a minority group -- is novel and is not supported either in the legislative history of Section 2 or in the case law interpreting the amendments to Section 2.

In reaching this new legal requirement, the lower court relied primarily upon DeBaca v. County of San Diego, ___ F. Supp. ___, 1992 W.L. 114049 (S.D. Cal. May 11, 1992), a single-judge decision (The district court also cited "Application of Voting Rights Act to

Communities Containing Two or More Minority Groups -- When Is the Whole Greater than the Sum of the Parts?", 20 Tex. Tech. L. Rev. 95 (1989), as authority.) However, an examination of the underlying facts in DeBaca do not support this new requirement.

The DeBaca plaintiffs were comprised of three minority communities which, collectively, did not comprise a cohesive majority of a single member district. Notwithstanding their lack of cohesiveness, they sought relief under Section 2, seeking to obtain remedial districts which would have enhanced their collective opportunity for electoral success. Because the aggregated group did not meet the cohesiveness prong of the Gingles test, the district court concluded that it would not exercise its authority and would defer to the government's policy choice. DeBaca at ____. DeBaca is a routine Section 2 case in which a group of plaintiffs simply failed to meet all of their evidentiary burdens.

In contrast, the court below found as a fact that the black and hispanic communities individually met all three criteria of Gingles. App. 67. DeBaca stands for no more than the proposition that, when no aggregation of minority groups can meet the cohesiveness test, then deference to state divisions of minority communities may be justified. As a result, DeBaca is clearly distinguishable.

The harshness of the new test the court imposes for remedy falls on the very groups that Section 2 is designed to protect. The evidence in South Florida is that voter polarization exists to deprive both racial and language minorities of an equal opportunity to nominate and elect candidates of their choice. The new requirement, instead

of quieting racial animosity, injects an element of unhealthy competition between racial and language minorities.

The additional requirement that minority plaintiffs prove that proposed plans do not adversely impact upon the election opportunities of other minority groups is not adequately defined in the lower court's opinion. Prior proof requirements in Section 2 cases, such as those established by White, supra, and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), were carefully engrafted onto the constitutional jurisprudence of the Fifteenth Amendment before being statutorily adopted by Congress in the 1982 Amendments to the Voting Rights Act. The court below did not define the extent or measure necessary to illustrate the lack of harm to other minority communities sufficient to meet the boundary lines in the context of reapportionment, some communities are benefitted and some are not. The lower court's decision leaves doubt as to what standard it was applying in making these policy choices.

C. Following Established Procedures Would Have Prevented The District Court's Remedial Dilemma.

Had the district court followed the remedial procedures established by this Court, then no undue evidentiary burden would have resulted; both the state and the minority communities would have been given the opportunity to develop plans to address the court's concern and a proper record for reaching a conclusion would have been established. Given the present record and the lack of a meaningful opportunity for the parties to address the court's remedial concerns, a remand for a complete remedy is required.

This Court has given clear guidance for the lower courts to follow in those instances in which legislatures have enacted or maintained unlawful districting plans.

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt. Connor v. Finch, 431 U.S. 407, 414-415, 97 S.Ct. 1828, 1833-1834, 52 L.Ed.2d 465 (1977); Chapman v. Meier, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); Gaffney v. Cummings, 412 U.S. 735, 749, 93 S.Ct. 2321, 2329, 37 L.Ed.2d 298 (1973); Burns v. Richardson, 384 U.S. 73, 84-85, 86 S.Ct. 1286, 1292-1293, 16 L.Ed.2d 376 (1966). When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. * * *
>
> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation," Connor v. Finch, supra, 431 U.S., at 415, 97 S.Ct., at 1833, of the federal court to devise and impose a reapportionment plan pending later legislative action.

Wise v. Lipscomb, 437 U.S. 535, 539-540 (1978).

D. In The Remedial Order, The District Court's Deference To State Policy Choices Overshadowed Its Remedial Obligations Under Section 2.

Even if the plaintiff groups involved do not themselves initially present the court with remedial plans which meet the court's standards, equitable jurisprudence has the flexibility to provide numerous remedial choices. Courts considering similar factual patterns have previously developed a number of procedural techniques which afford both the state and the minority communities a voice in shaping a remedy to fit the violation. The finding of a violation of Section 2 -- as to both black and Hispanic plaintiffs -- presented the court below with numerous equitable options, including:

a. allowing the parties to propose additional remedies;

b. allowing the state to propose a remedy, subject to evaluation and comment by opposing parties;

c. adopting an interim plan and allowing the legislature to remedy the problems or, failing legislative action, allowing the parties to address the court's concerns;

d. Employing a special master to propose a remedy.

See White v. Weiser, 412 U.S. 783 (1973); McDaniels v. Mehfoud, 702 F. Supp. 588 (E.D. Va. 1988); Tallahassee Branch of NAACP v. Leon County, 827 F.2d 1436 (11th Cir. 1987), cert. denied, 488 U.S. 960 (1988); Dickinson v. Indiana State Election Bd., 933 F.2d 497 (7th Cir. 1991); Washington v. Tensas Parish School Board, 819 F.2d 609 (5th Cir. 1987).[18]

Other courts have ordered interim remedial measures or announced a violation and then given the state or the parties the opportunity to meet the legal requirements of the redistricting.[19] For example, in Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1985), in deference to the primary jurisdiction of state legislatures over legislative reapportionment, the three judge court entered only a finding of liability and gave the legislature the task of remedying the violation within a specified time.[20]

---

[18] Recently, in Meek v. Metropolitan Dade County, No. 86-1820-CIV-G (S.D. Fla. August 14, 1992), the district court ordered the parties to submit proposed remedial plans within twenty days of its finding of Section 2 liability. See n.16, supra.

[19] Plans were submitted to the court below which were sufficient to remedy the Section 2 violations. See _____, supra.

[20] Other courts, however, including Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), cert. denied sub nom., City Council of the City of Chicago v. Ketchum, 471 U.S. 1135 (1985), have refrained from granting deference to legislative policy and have proceeded directly to the remedy upon a finding of liability.

Any of the alternative approaches listed above would have been responsive to the equitable duty of the courts under Section 2 to eliminate presently existing vote dilution. The difficulty with the approach of the court below is that it permanently leaves in place an admittedly dilutive and unlawful scheme and prospectively prohibits the parties or the legislature from offering a solution which achieves a proper result.

If full relief could not be given as a practical matter, then interim relief or partial relief should have entered. For example, minority communities' positions would have been enhanced if either the De Grandy plan which created four Hispanic districts and two black majority districts or the NAACP plan which created three Hispanic districts and three black districts had been adopted. Instead, the court approved a Senate plan which creates only three Hispanic and two majority black districts.

The principal limit on the court's authority is the requirement that the government be given the first opportunity to develop a remedy subject to court approval. Wise v. Lipscomb, 437 U.S. 535 (1978). Some courts have construed this limitation to mean that the state legislature must have the opportunity to devise a remedy. See, e.g., Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988). Other courts, however, have merely given the state the first opportunity to submit a plan in the remedial stage of litigation. In Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988), the court appointed an expert to devise a

remedial plan after the defendant jurisdiction had proposed an unacceptable remedy.

Facing impending elections, federal judges are left with several options. Given the fact that violations of voting rights have been held to be irreparable harm per se,[21] the court must determine which if any plan should be implemented for the upcoming elections. If it fails to act promptly, then the election process is impeded because candidates do not have time to mount effective campaigns and the electorate is unable to cast an informed ballot. If it fails to remedy discrimination in voting, then minority groups whose protection the 14th and 15th amendments are designed to protect continue to suffer discrimination. Some courts have left the state's plan in place, giving the parties the opportunity to come forward with remedial plans. Some courts have drawn interim plans, giving the state the opportunity to correct the plans for subsequent elections. In no case located by the Appellants has a court found a Section 2 violation but failed to offer plaintiffs interim or the prospect of future relief.

As to the House, the court sought to meld the plaintiffs' proposed districts into the plan ratified by the state legislature. As to the Congress, a special master selected elements from each of the parties' proposals to propose a blended remedy to the court. Each remedy had the effect of improving the electoral condition of the minority community.

---

[21] See Reynolds v. Sims, 377 U.S. 533, 562, reh'g denied, 379 U.S. 870 (1964); Dillard v. Crenshaw County, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986); Harris v. Graddick, 593 F. Supp. 128, 135, (M.D. Ala. 1984).

The appellants do not criticize the district court's desire to defer to state policy interests, absent a violation of federally protected rights. The appropriate exercise of federal authority in undertaking the "unwelcomed obligation" of reapportionment is a delicate and sensitive question. The district court in De Grandy wrestled with the dilemma of when to undertake this burden throughout the course of the litigation. Due to the extraordinary deference the court gave to the defendants and the defendants' refusal to produce timely plans, the court was unable to conduct the hearings in an optimum time frame. This Court has recognized that the exigencies of the situation may require a court, after finding a constitutional or statutory violation, to impose a less than ideal plan or a plan of one of the parties temporarily in order to minimize the injury to the public and allow elections to take place.[22]

---

[22] Upham v. Seamon, 456 U.S. 37 (1982), "It is true that we have authorized district courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. See, e.g., Bullock v. Weiser, 404 U.S. 1065, 92 S.Ct. 750, 30 L.Ed.2d 752 (1972); Whitcomb v. Chavis, 396 U.S. 1055, 90 S.Ct. 748, 24 L.Ed.2d 757 (1970). Necessity has been the motivating factor in these situations." This principle has been followed by the district courts. Campos v. Houston, 776 F. Supp. 304 (S.D. Tex. 1991) (District court is forced to use unprecleared plan in order to allow elections to go forward). Campos v. Houston, ___ U.S. ___, 112 S.Ct. 354 (Scalia Cir. Justice) (Oct. 29, 1991) (Despite doubts about the district court's authority to issue such an order, Justice Scalia refused to stay the district court's order because, "I am not certain that more good than harm to the

In this case, the court did not impose this plan as a temporary or an interim plan, but, instead, permanently foreclosed the ability of plaintiffs to remedy the identified violation.[23] This procedure is plain error.

The action of this Court in staying the order of the district court has eliminated the time constraint since the 1992 elections will now be held under the state's plan. A prudent course for the Court would be to remand to the district court for a full remedial hearing that would allow all parties the opportunity to cure the violation of the Voting Rights Act and the court may have regarding the conflicting interest of minority communities.

---

public interest will be achieved by staying the district court's order, making the imminent elections . . . impossible.") Watkins v. Mabus, 771 F. Supp. 789 (S.D. Miss.), aff'd in part, vacated in part, ___ U.S. ___, 112 S.Ct. 412 (1991) (use of current plan allowed for the upcoming election only. The court will impose a plan after the election if the legislature is unable to produce a plan in the next session.)

[23] The court's language is unusual regarding the Senate plan. The court states that the state's redistricting scheme violates the Voting Rights Act, but "imposes that plan [the state's Senate redistricting scheme] as the remedy in this case." App. 81. Nowhere in the court's opinion does it state that this is an interim plan nor does it indicate that plaintiffs can revisit the remedy issue.

Conclusion

For these reasons stated, probable jurisdiction should be noted.

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
Patton, Boggs & Blow
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
Rumberger, Kirk & Caldwell
P.O. Box 10507
Tallahassee, FL 32302
(902) 222-6550

Alberto R. Cardenas
Ferrell, Cardenas, Fertel & Morales
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
*Counsel of Record

APPENDIX

Table of Contents

Judgment 1

Opinion 5

U.S. Constitution, Amendment I 93

U.S. Constitution, Amendment XIII 93

U.S. Constitution, Amendment XIV 93

U.S. Constitution, Amendment XV 93

42 U.S.C., § 1973 94

42 U.S.C., § 1973c 95

Notice of Appeal 98

Constitution of the State of Florida,
Art. iII, Section 16 106

Letter to Florida Supreme Court 109

Affidavit of Rockie Pennington 110

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MIGUEL DE GRANDY, et al.,

Plaintiffs,

and

GWEN HUMPHREY, et al.,

Plaintiffs-Intervenors,

v. TCA 92-40015-WS

T.K. WETHERELL, et al.

Defendants.

_____/

FLORIDA STATE CONFERENCE
OF NAACP BRANCHES, et al.

Plaintiffs,

v. TCA 92-40131-WS

LAWTON CHILES, et al.

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff,

v. TCA 92-40220-WS

STATE OF FLORIDA, et al.,

Defendants.

_____/

JUDGMENT

Before HATCHETT, Circuit Judge, STAFFORD and VINSON, District Judges

BY THE COURT

It is ORDERED, ADJUDGED, and DECREED as follows:

1. The state of Florida's state senatorial districts embodied in Senate Joint Resolution 2-G, as modified by the Florida Supreme Court on June 25, 1992 ["1992 Florida Senate Plan"] do not violate Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 et seq.)

2. The court adopts the 1992 Florida Senate Plan as the plan to be utilized in the 1992 Florida State Senate elections and in Florida State Senate Elections thereafter.

3. The state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 et seq.).

3. [sic] The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall:

(a) conduct state senatorial elections in 1992 in accordance with the 1992 Florida Senate Plan, a map and written description of which are attached tc this Judgment[1];

(b) conduct state senatorial elections in years after 1992 in accordance with the 1992 Florida Senate Plan.

DONE AND ORDERED this 2nd day of July, 1992.

/s/
JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

[1] The map and written description of the Florida Senate Plan, attached to the Judgment is omitted from the Appendix; a copy of the Plan is lodged with the Clerk of the Court. (Appellants' footnote; not appearing in Judgment.)

/s/
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

/s/
ROGER VINSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MIGUEL DE GRANDY, MARIO DIAZ-BALART, ANDY IRELAND, CASIMER SMERICKI, VAN B. POOLE, TERRY KETCHEL, ROBERTO CASAS, RODOLFO GARCIA, JR., LUIS ROJAS, LINCOLN DIAZ-BALART, JAVIER SOUTO, JUSTO LUIS POSO, ALBERTO CARDENAS, REY VELAZQUEZ, LUIS MORSE, ALBERTO GUTMAN, KAREN E. BUTLER, SGT. AUGUSTA CARTER, JEAN VAN METER, ANNA M. PINELLAS, ROBERT WOODY, GINA HAHN, BILL PETERSEN, TERRY KESTER, MARGIE KINCAID, and BROOKS WHITE,

Plaintiffs,

v. TCA 92-40015-WS

T.K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, GWEN MARGOLIS, in her official capacity as

President of the Florida
Senate, LAWTON CHILES,
in his official capacity
as Governor of the State
of Florida, JACK GORDON,
in his official capacity
as Chairman of the Senate
Reapportionment Committee,
PETER R. WALLACE, in his
official capacity as
Chairman of the House
Reapportionment Committee,
JIM SMITH, in his official
capacity as Secretary
of State of Florida,
ROBERT BUTTERWORTH,
in his official capacity
as Attorney General of Florida,

Defendants.

_____/

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, T. H. POOLE, SR., WHITFIELD JENKINS, LEON W. RUSSELL, WILLYE DENNIS, TURNER CLAYTON, RUFUS BROOKS, VICTOR HART, KERNA ILES, ROOSEVELT WALTERS, JOHNNIE MCMILLIAN, PHYLLIS BERRY, MARY A. PEARSON, MABLE BUTLER, IRIS WILSON, JEFF WHIGHAM, AL DAVIS, PEGGY DEMON, CARLTON MOORE, RICHARD POWELL, NEIL ADAMS, LESLIE MCDERMOTT,

ROBERT SAUNDERS, SR., IRV MINNEY, ADA MOORE, ANITA DAVIS, and CALVIN BARNES,

Plaintiffs,

v. TCA-No. 92-40131-WS

LAWTON CHILES, in his official capacity as Governor of Florida, JIM SMITH, in his official capacity as Secretary of State of Florida, ROBERT BUTTERWORTH, in his official capacity as Attorney General of Florida, GWEN MARGOLIS, in her official capacity as President of the Florida Senate, T. K. WETHERELL, in his official capacity as Speaker of the Florida House of Representatives, JACK GORDON, in his official capacity as Chairperson of the House Reapportionment Committee, and PETER R. WALLACE, in his official capacity as Chairman of the House Reapportionment Committee,

Defendants.

_____/

UNITED STATES OF AMERICA,

Plaintiff,

v. TCA-No. 92-40220-WS

STATE OF FLORIDA, a State of the United States; T.K. WETHERELL, Speaker of the Florida House of Representatives; GWEN MARGOLIS, President of the Florida Senate; LAWTON CHILES, Governor of the State of Florida; ROBERT BUTTERWORTH, Attorney General for the State of Florida; PETER R. WALLACE, Chairman of the House Reapportionment Committee; JACK GORDON, Chairman of the Senate Reapportionment Committee; JIM SMITH, Secretary of State for the State of Florida,

Defendants.

_____/

Before HATCHETT, Circuit Judge, STAFFORD and VINSON, District Judges.

I. PROCEDURAL HISTORY

Florida currently has forty Senate districts and one hundred twenty House of Representative districts. These districts were created in 1982 and are currently malapportioned. According to the 1990 census data, the total population of the state of Florida is 12,937,926 persons. Between the census of 1980 and 1990, Florida's population increased 3,213,602 persons. To achieve equality between Florida's forty Senate districts, each district would ideally contain 323,448 persons. To achieve equality between

Florida's one hundred twenty House districts, each district would ideally contain 107,816 persons.

On the opening day of the 1992 Florida legislative session, Miguel De Grandy, a member of the Florida House of Representatives, and other registered voters ("De Grandy plaintiffs") filed a complaint against the Speaker of the Florida House of Representatives, the President of the Florida Senate, the Governor of Florida, and other state officials. The De Grandy plaintiffs filed the complaint in this court challenging the constitutionality of Florida's current congressional and state legislative districts. The De Grandy plaintiffs alleged that the current districts violate both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965, as amended, and urged this court to assert jurisdiction in order to redistrict and reapportion the state.

The De Grandy plaintiffs filed a first amended complaint on January 23, 1992. The defendants moved to dismiss the complaint. After hearing arguments on the motion, the court dismissed the action without prejudice for lack of subject matter jurisdiction (document 41). On March 9, 1992, the De Grandy plaintiffs filed a second amended complaint (document 44) alleging violations of Article I, Section 2 of and the Fourteenth and Fifteenth Amendments to the United States Constitution as well as violations of Sections 2 and 5 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 et seq.

In short, Count I alleged that the present Florida House and Senate districts were unconstitutional inasmuch as they violated the Equal Protection Clause of the Fourteenth Amendment, Article I, Section 2 of the United States Constitution and the "one-person, one-vote" principle.

Count II alleged that because these districts diluted the voting strength of minority voters, they violated the Voting Rights Act of 1965, as amended. Count III alleged that the Florida Legislature was at an impasse in adoption of state redistricting plans. Counts V and VI alleged that the time lines for redistricting set forth in Article III, Section 16 of the Florida Constitution, in conjunction with the preclearance requirements of Section 5 of the Voting Rights Act, "permit the adoption and implementation of new district lines to take place so late in the year after the decennial census" that they result in a deprivation of plaintiffs' right to participate in the 1992 elections on a fair and equal basis.[2] Document 44 at ¶ 120. Count V alleged a facial

---

[2] Article 3, Section 16(a) of the Florida Constitution provides that:

> Senatorial and representative districts. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory.

If the legislature should fail at its regular session to apportion themselves into the legislative districts as required by Article 3, Section 16, the governor is required to reconvene the legislature within thirty days in a special apportionment session not to exceed thirty consecutive days. Fla. Const. Art. 3 § 16(a). During this time, no

other business shall be transacted and it shall be mandatory duty of the legislature to adopt a joint resolution. Fla. Const. Art. 3 § 16(a). If the legislature adopts a reapportionment plan, the constitution requires the attorney general to petition the Florida Supreme Court for a declaratory judgment determining the validity of the apportionment. Fla. Const. Art. 3 § 16(c). The Supreme Court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

If the Supreme Court determines that the apportionment made by the legislature is invalid, the governor shall reconvene the legislature within five days thereafter in an extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the Supreme Court. Fla. Const. Art. 3 § 16(d). If the Supreme Court determines that the legislative apportionment is valid, the plan must be precleared by the Department of Justice before it may be considered validly enacted. Until the plan is precleared, it may not be used in any election.

The Florida constitution is silent as to what occurs if the Department of Justice fails to preclear a plan previously validated by the Supreme Court. In its order dated May 13, 1992, the Florida Supreme Court explicitly "retain[ed] exclusive state jurisdiction to consider any and all future proceedings relating to the validity of this apportionment plan." In re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, No. 79-674, slip op. at 23 (Fla. May 13, 1992).

challenge, while Count VI alleged an "as applied" challenge. Count VII alleged that certain defendants have "intentionally misused the time lines and procedures found in Article III . . . to delay the redistricting process to the advantage of white incumbents and to the detriment of voters and would be challengers to those incumbents. Document 44 at ¶ 130. On March 13, 1992, the Florida legislature ended its regular session without adopting a state reapportionment plan.

On March 27, 1992, this three-judge court convened, denied all motions to dismiss and established an expedited schedule for adoption of congressional and state legislative plans by May 29, 1992 (document 56). That scheduling order in no way enjoined or prevented state redistricting and reapportionment agencies from attempting to enact their own plans. On April 2, 1992, the Governor of Florida called a special redistricting and reapportionment session of the Florida Legislature pursuant to Article III, Section 16(a), of the Florida Constitution. On April 10, 1992, the legislature adopted Senate Joint Resolution 2-G reapportioning state House and Senate districts.

Meanwhile, this case progressed and on April 6, 1992, the court appointed a special master pursuant to Fed. R. Civ. P. 53 for both Congressional and legislative reapportionment. On April 7, 1992, the court consolidated this case with a similar lawsuit filed by the Florida State Conference of the NAACP Branches and many individual African-American voters. The court also granted other persons and organizations leave to intervene or act as

amicus curiae.[3] On April 17, 1992, the Attorney General of the State of Florida submitted Senate Joint Resolution 2-G concerning state legislative reapportionment to the United States Department of Justice (DOJ) for preclearance pursuant to Section 5 of the Voting Rights Act. That same day, this court issued an order bifurcating the congressional redistricting and state reapportionment hearings. The special master promptly concluded his hearings on congressional redistricting and issued his report and recommendation. This court considered the parties objections, conducted a hearing and issued its judgment on May 29, 1992 (document 439).

On May 13, 1992, the Florida Supreme Court validated Senate Joint Resolution 2-G. As a result of the validation, this court stayed proceedings related to state reapportionment until May 27, 1992. A hearing was held on May 27, 1992 at which time the court considered all

---

[3] Those acting as amici are Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; the Cuban American Bar Association; The Coalition of Hispanic Women; and State Representative Daniel Webster. Plaintiff-intervenors include Gwen Humphrey, Vivian Kelly, Gene Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. William ["Humphrey Intervenors" or "plaintiffs"]; State Representatives Darryl Reaves, Corinne Brown and James T. Hargrett ["Reaves-Brown" or "plaintiffs"], United States Representative Jim Bacchus; and United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

pending motions.[4] At the hearing, the court granted the government's motion to be dismissed as a party to the litigation, but invited comments from J. Gerald Hebert of the United States DOJ. Mr. Hebert advised the court that the Justice Department would probably issue its decision by June 17, 1992 as to whether the House and Senate plans would be precleared. All other motions were denied, and the stay of legislative reapportionment was continued.

On June 16, 1992, the DOJ issued its preclearance decision, noting that its review and determination addressed the plans only insofar as the five preclearance counties were affected. Exhibit 1 to document 447. The Attorney General of the United States did not interpose any objection to the Florida House of Representatives redistricting plan. The DOJ refused to preclear the Senate plan stating:

> We are unable to reach the same conclusion with regard to the Senate redistricting plan. With regard to the Hillsborough County area, the state has chosen to draw its senato-

[4] The motions included the Attorney General's Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim Upon Which Relief Can Be Granted (document 363), an Application for Preliminary Injunction Against Implementation of SJR 2-G filed by the Humphrey intervenors (document 390), a Motion for Temporary Restraining Order and Preliminary Injunction (document 391) and a Motion to Lift Stay, Establish Scheduling Order and Set Trial on Legislative Redistricting (document 416) filed by the DeGrandy plaintiffs (document 416) and a Motion to Dismiss and for Injunctive Relief filed by the defendants' (document 426).

> rial districts such that there are no districts in which minority persons constitute a majority of the voting age population. To accomplish this result, the state chose to divide the politically cohesive minority populations in the Tampa and St. Petersburg areas. Alternative plans were presented to the legislature uniting the Tampa and St. Petersburg minority populations in order to provide minority voters an effective opportunity to elect their preferred candidate to .the State Senate. . . . [T]he information before us, including the economic and other ties between Tampa and St. Petersburg, as well as the political cohesiveness of minority voters in those two cities, demonstrates that the two areas do share a commonality of interest. Finally, we have examined evidence, including evidence in the legislative record, which suggests that the state's approach to senatorial redistricting in the Hillsborough area was undertaken with an intent to protect incumbents. Such a rationale, of course, cannot justify the treatment of minority voters in this area by the State Senate plan.

Exhibit 1 to document 447 at 2-3.

Plaintiffs immediately filed a Renewed and Expedited Motion to Lift Stay, Establish Scheduling Order, and Set Trial on Legislative Redistricting (document 444) and a Motion for Leave to File Third Amended Complaint (document 448). The latter was granted and in their third amended complaint, plaintiffs added a count alleging that

the 1992 joint resolution of apportionment violated Section 2 of the Voting Rights Act. On June 18, 1992, the court issued a scheduling order and set a hearing on all pending motions for June 26, 1992 (document 449).

The Florida Supreme Court set an expedited schedule to address the DOJ's objection to the Senate plan. In its order dated June 17, 1992, the Supreme Court encouraged the legislature to adopt a proper reapportionment plan, taking into consideration the objections of the Justice Department. See Exhibit A to document 462 at 2. The order continued: "In the event the Legislature declares its inability to adopt a reapportionment plan or fails to adopt a plan by June 24, 1992, this Court will conclude that a legislative impasse has occurred, and this Court will promptly undertake to make such reapportionment." The court also set forth an abbreviated time frame within which action must be taken.[5]

In a letter dated June 18, 1992, the Speaker of the House (defendant Wetherell) and President of the Senate

---

[5] "[A]ll interested parties are advised that they may file with this Court pertinent briefs and proposed alternate plans by no later than the following, whichever occurs first:

(a) two days after the Legislature's adoption of a reapportionment plan;
(b) two days after the Legislature's declaration of an inability to adopt a reapportionment plan; or
(c) June 26, 1992.

Exhibit A to document 462 at 2.

(defendant Margolis) advised the Supreme Court of their decision not to convene their respective Houses in an extraordinary apportionment session. See Exhibit A to document 478. The court was also advised that the Governor did not intend to convene the legislature in an extraordinary apportionment session. Exhibit A to document 478. In an order dated June 17, 1992, the Florida Supreme Court declared a legislative impasse and adopted an amended schedule.[6]

Jurisdictional questions were raised both in this court and in the Florida Supreme Court. The De Grandy plaintiffs filed their action in this court on January 14, 1992, and have continually asserted that jurisdiction to correct the Department's Section 5 objection lies only in this court. The Florida Supreme Court, however, without discussing the propriety of concurrent federal jurisdiction, held that

> [T]he reapportionment of state legislative bodies is not a power delegated by the Constitution of the United States to the federal government. Under the provisions of the Tenth Amendment to the United States Constitution, this is a power reserved

---

[6] By that order, each interested person was permitted to submit by noon, June 22, 1992, a proposed correction to modify the redistricting plan for the Florida Senate so as to resolve the specific objection outlined by the United States Department of Justice in senate districts affecting Hillsborough County. Furthermore, each interested person was permitted to submit by noon, June 23, 1992, a report analyzing and comparing the merits of any proposal.

to states. Of course, this Court is obligated to apply any applicable federal constitutional provisions and any federal statutes implementing these provisions.

The Florida Constitution places upon this Court the responsibility to review state legislative reapportionment. Art. III, § 16, Fla. Const. Pursuant to that authority, we approved the original legislative reapportionment and retained jurisdiction to entertain subsequent objections thereto. Consistent with the provisions of article III, section 16 of the Florida Constitution, we believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the Legislature has declared that it is not going to do so.

In Re: Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, No. 79,674, slip. op. at 2-3 (Fla. June 25, 1992) (document 491). Defendants have consistently maintained that because Article III, Section 16 of the Florida Constitution specifically conferred jurisdiction over legislative redistricting to the Florida Supreme Court, this court should abstain in deference to the principles of comity and federalism. This court has declined the invitation to abstain.

On June 25, 1992, the Florida Supreme Court adopted a Senate redistricting plan which it felt complied with the DOJ's objection to Hillsborough County. After reviewing the six submitted plans, the Supreme Court adopted the plan submitted by Gwen Humphrey, et al., and supported by Representative Darryl Reaves, et al.

["Humphrey-Reaves plan"]. Constitutionality of SJR-2G, No. 79,674, slip. op. at 5. Chief Justice Shaw wrote separately to indicate his opinion that the overall plan--including the present revision--does not comply with Section 2 of the Voting Rights Act:

> Because this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry, I concur in the majority opinion. I believe the present revision in the plan meets the objection evinced in DOJ's admittedly restricted review. I write to note, however, that I still conclude that the overall plan, including the present revision, fails under Section 2 of the Act because it does not provide an equal opportunity for minorities to elect representatives of their choice to the Florida legislature, as noted in my earlier dissent.

Constitutionality of SJR-2G, No. 79,674, slip. op. at 11 (Shaw, C.J. specially concurring).

The focus of this litigation has continually shifted. Plaintiffs' first amended complaint alleged that the delay inherent in Article III, Section 16 of the Florida Constitution (and the fact that the legislature was not expected to pass a reapportionment plan in time for the scheduled 1992 elections) resulted in an unconstitutional intrusion in a citizen's right to vote. When the legislature passed SJR 2-G, plaintiffs asserted that this plan would not be precleared by the DOJ, and then when the Senate plan was, indeed, not precleared, plaintiffs asked this court to adopt a plan which complied with Section 5 of the Voting Rights Act.

On June 23, 1992, the DOJ filed in this court its own lawsuit[7] against the State of Florida and several elected officials alleging that (1) the redistricting plans for the members of the Florida Legislature dilute the voting strength of African-American and Hispanic citizens in several areas of the state in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, et seq. and (2) the state's proposed Senate plan in the Hillsborough County area divides the politically cohesive minority populations in the Tampa and St. Petersburg areas such that there are no senatorial districts in which minority persons constitute a majority of the voting age population.[8] The De Grandy

---

[7]United States v. State of Florida, et al., TCA 92-40220-WS.

[8]This lawsuit was not entirely unexpected, for in its letter refusing to preclear the Florida Senate plan, the Justice Department indicated its belief that both the Senate and House plan contained Section 2 violations:

> Finally, we understand that there are challenges under Section 2 of the Voting Rights Act presently being considered in the consolidated cases of De Grandy v. Wetherell, No. 92-40015-WS and Florida State Conference of NAACP Branches v. Chiles, No. 92-40131-WS (N.D. Fla.). In addition, some of the comments we received alluded to various concerns involving the adequacy of the plans in non-covered counties. Because our review of these plans is limited by law to the direct impact on geographic areas covered by Section 5, we

plaintiffs were also permitted to amend their complaint to allege Section 2 violations in both the House and Senate plans. See document 448.[9] On June 26, 1992, this court commenced its hearing on legislative reapportionment. At

---

> did not undertake to assess the lawfulness of the legislative choices outside of Collier, Hardee, Hendry, Hillsborough and Monroe counties. We do note, however, that allegations have been raised regarding dilution of minority covered jurisdictions, for example in the Pensacola-Escambia County area and the Dade County area. Because these and other legislative choices did not directly impact upon the five covered counties, they cannot be the basis of withholding preclearance of either plan.

Exhibit 1 to document 447 at 6.

Because the Department's "preclearance" jurisdiction is limited to reviewing Florida's five covered counties, it could not reject either the House or Senate plan on the basis that it did not comply with Section 2 of the Voting Rights Act.

[9] This motion was granted by document 460. In its order dated May 13, 1992, the Florida Supreme Court indicated its willingness to entertain Section 2 challenges to the then-validated plan, but plaintiffs have elected to assert their Section 2 claims in this federal forum.

the outset, the court ruled on several pending motions[10] and heard argument on the others. After argument, the court granted Alberto R. Cardenas' and Alan K. Fertel's Motions for Leave to Appear Pro Hac Vice (documents 482 and 483) and the United States' Motion to Consolidate its lawsuit into the pending litigation (document 2).[11] The court also denied as moot Defendant Wetherell's and Margolis' Motions to Quash Subpoena (documents 485 and 487), and denied Plaintiffs' Motion to Strike Proposed State Senate Redistricting Plans Submitted by Margolis and Wetherell (document 478). The court then turned to the Florida Senate redistricting plan.

The DOJ indicated its belief that the Florida Supreme Court's modification to the Hillsborough County area Senate districts satisfied its previous objection. The Department stated that a preclearance decision would be made within days of the State's submission of the plan to the Department. The same day, this court imposed the Florida Supreme Court plan as its own plan for section 5 purposes. See Tr. I-37. The effect of this was to eliminate the need for preclearance. "Plans imposed by court order are not subject to the [preclearance] requirements of § 5."

---

[10] The court GRANTED the motions contained in documents 71, 204, 381, and 424 and DENIED the motions contained in documents 366, 368, 372, 386, 443, 445, 446, 450, 452, 453, 455, 459, 477, 481, 499 and 503.

[11] By order dated June 27, 1992 and pursuant to Title 28, United States Code, Section 2284, the Chief Judge of the Eleventh Circuit Court of Appeals convened a three-judge panel consisting of the same three judges.

Wise v. Lipscomb, 437 U.S. 541 (1978); see also State of Texas v. United States of America, 785 F. Supp. 201, 205 (D.D.C. 1992). At the same time, however, the court indicated its intention to entertain Section 2 challenges on both the Florida Senate and Florida House plans.[12]

In Count VIII of the De Grandy plaintiffs' fourth amended complaint[13], plaintiffs allege that both the Florida House and Senate redistricting plans encompassed in joint resolution of legislative reapportionment, SJR 2-G, violate Section 2 of the Voting Rights Act, Title 41, United States Code, Section 1973, et. seq. See document 506 at 51-60. Specifically, plaintiffs contend that "[t]he joint resolution of apportionment . . unlawfully fragments cohesive minority communities and otherwise impermissibly submerges their right to vote and to participate in the electoral process. Document 506 at 52 ¶ 137. Plaintiffs attack both the Dade County districts in the Senate plan and

---

[12] It was our intent to immediately conduct a section 2 review of the Senate plan and we adopted the plan despite its potential section 2 problems. Because the plan adopted by the Florida Supreme Court could not be a valid plan subject to a section 2 challenge until after it was precleared by the Department of Justice, we adopted the Supreme Court plan as our own plan in order to give the parties a formal plan to challenge.

[13] In a ruling from the bench on June 27, 1992, the court permitted plaintiffs to once again amend their complaint. Both the Justice Department and the NAACP plaintiffs allege section 2 violations; the De Grandy fourth amended complaint, however, is more precise.

the Dade and Escambia County districts in the House plan as violative of Section 2[14], alleging that

> The African-American population in Escambia County was split into two districts, one of 30% black population and one of 14% black population. SJR 2-G deliberately fractures Escambia County's African-American population in order to protect white, incumbent representative, Speaker-designate Bo Johnson. Alternative plans encapsulate the black population in a

[14] In their fourth amended complaint, plaintiffs also attacked several other House districts. With court approval, plaintiffs later dismissed their Section 2 challenges to districts 8 (Leon, Gadsden, Calhoun, Jackson, and Liberty Counties), 22 (Alachua, Marion, Levy, Putnam, St. Johns Counties), 28 (Volusia, Seminole, Brevard, Counties), 45 (Polk and Hillsborough Counties), 55 (Pinellas County), and 82 (Charlotte, DeSoto, Highlands, Indian River, Lee, Okeechobee, St. Lucie Counties). Although plaintiffs' motion indicates that this dismissal would be without prejudice, the court did not state whether the dismissal would preclude plaintiffs filing a subsequent lawsuit challenging the dismissed districts.

Because plaintiffs concede that a majority African-American district cannot be drawn in Escambia County, their challenge is not really based on Section 2 of the Voting Rights Act; rather, plaintiffs' allegations that the district lines were drawn with a discriminatory purpose is based on the Fifteenth Amendment to the United States Constitution.

> relatively compact, cohesive, 40% black community of interest.
>
> * * *
>
> In Dade County, black citizens were fragmented in District 118 and District 119. Many African-American seats were also packed with many Hispanic citizens which dilutes the ability of African-Americans to elect candidates of choice.
>
> * * *
>
> Hispanic voters are packed in Districts 110 (82.1%), 111 (75.7%), and 114 (77.5%) and further submerges Hispanic voters in black minority districts, specifically, District 103 (62% black, 27.8% Hispanic), District 109 (63.0% black, 34.5% Hispanic), and District 118 (34.5% black, 27.1% Hispanic). Less egregious examples of packing, but still having the same delusionary effect, are District 104 (57.8% black, 16.1% Hispanic), Anglo District 105 (19.2% Hispanic), Anglo District 106 (32.3% Hispanic), District 108 (66.2% black, 16.0% Hispanic). SJR 2-G appears to purposefully pack, fracture and submerge Hispanic population deliberately to dilute Hispanic voting strength;
>
> Nine Hispanic-American majority districts were created in SJR 2-G; however, other plans submitted to the Legislature show that

eleven majority-Hispanic-American seats can .be created in the Dade County area. This dilution of Hispanic voting strength is accomplished by the aforementioned packing, fracturing, and submergence with the intent and purpose of protecting white incumbents;

* * *

With respect to the plan for apportionment for the Florida State Senate, the redistricting plan enacted by the State of Florida creates 7 Senate districts in the Dade County area. The state's plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the voting age population only in three districts. The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the state is divided into equally populated legislative districts which respect communities of interest and follow other non-discriminatory plan-drawing criteria, Hispanics would constitute a significant voting age majority of the population in one additional Senate district in Dade County.

Document 506 at ¶¶ 141(a), (i); 142(a), (b). The complaint also alleges that the creation of these districts was both intentional and willful, and for the purpose of preserving white incumbent legislators and discriminating against African-American and Hispanic candidates and electorate. Document 506 at ¶ 145.

The entire trial lasted five days--from Friday, June 26, 1992 through Wednesday, July 1, 1992, excluding Sunday, June 28, 1992. The court first heard testimony concerning the Senate Plan. At the close of plaintiffs' case in chief, defendants orally moved for a directed verdict, which was denied by the court. Tr. III-216. The Senate defendants then presented their case. The court next turned to the attack upon the Dade County portion of the House plan.

The parties advised the court that they were attempting to settle the Escambia portion of the lawsuit by redrawing the Escambia County House districts. After hearing the testimony of one of plaintiffs' Escambia County witnesses, the court ruled from the bench that the "plaintiffs [had] established a prima facie case on the constitutional violation in the Escambia County area of Florida." Tr. IV-18. Before the close of plaintiffs' prima facie case, the court was notified that the parties, except for plaintiff-intervenor Darryl Reaves, had reached a settlement agreement as to the Escambia County House districts. Upon the granting of the House defendants' oral motion to dismiss Reaves for lack of standing as to Escambia County,[15] Tr. VIII-59, the court considered and approved the proposed consent judgment (document 548). See Tr. VIII-94.

On July 1, 1992, at the close of all testimony and oral argument, the court ruled from the bench that

> the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the

---

[15]Reaves is a resident of Dade County.

> Gingles standard, but the plaintiffs[16] have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida. . . . Consequently, under Supreme Court precedent, this court must give deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court.

Tr. VIII-53. The court denied plaintiffs' oral motion for reconsideration. Tr. VIII-61.

After hearing closing argument as to the Dade County portion of the Florida House plan, the court ruled from the bench that "under the totality of the circumstances, the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County." Tr. VIII-83. The court indicated its intention to immediately proceed into the remedy phase of this case. The court later imposed the Modified De Grandy Plan as its own plan. Tr. VIII at 160. On July 2, 1992, the court entered judgment as to the 1992 Florida Senate Plan (document 553) and as to the 1992 Florida House Plan (document 554), the latter supplemented on July 6, 1992 (document 559). Following the trial, the House and Executive defendants moved for reconsideration (documents

[16]The court specifically noted that its ruling applied to all plaintiffs and not just the De Grandy plaintiffs. Tr. VIII at 60.

550 and 556) These motions were denied (documents 555 and 560). The House defendants also moved for reconsideration, rehearing and for a stay (document 561) the court denied (document 571).

This opinion memorializes and explains the court's rationale for its July 2, 1992 rulings.

II. FINDINGS OF FACTS AND CONCLUSIONS OF LAW[17]

A. Section 2 of the Voting Rights Act

As amended and in pertinent part, Section 2 of the Voting Rights Act of 1965 provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the

[17]Any finding of fact which may be a conclusion of law shall be considered a conclusion of law. Conversely, a conclusion of law which may be a finding of fact shall be so considered.

> circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance' which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

As originally passed, Congress intended for the language of Section 2 to parallel the language of the Fifteenth Amendment. City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980) (plurality opinion). Because Section 2 parallelled the Fifteenth Amendment, the plurality of the Supreme Court held that a plaintiff was required to prove discriminatory intent to establish a violation of Section 2. Bolden, 447 U.S. at 62, 71. In response to the Supreme Court's ruling in Bolden, Congress amended Section 2 in 1982 to include a "results" or "effects" test to determine whether racial vote dilution has occurred. See Senate Report at 27; Thornburg v. Gingles, 478 U.S. 30, 35 (1986); see also Burton v. Sheheen, No. 3:91-2983-1, 1992 U.S. Dist. LEXIS 7461, slip op. at 32-36 (D.S.C. 1992).

In Thornburg v. Gingles, 478 U.S. 30 (1986), the Supreme Court received its first opportunity to review the 1982 Section 2 amendments. Gingles involved a Section 2 challenge to the use of multi-member districts in North Carolina. The Court held that "[t]he essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Gingles, 478 U.S. at 47. Additionally, the law is clear that Section 2 extends coverage to "language minorities" including Hispanics. Chisom v. Roemer, 111 S.Ct. 2354, 2362 & n.18 (1991); Hastert v. State Bd. of Elections, 777 F. Supp. 634, 648 (N.D. Ill. 1991).

In determining whether a Section 2 violation has occurred, "a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'" Gingles, 478 U.S. at 44 (quoting Senate Report at 27). The Supreme Court in Gingles reiterated the list of "typical" factors which may be relevant to, and probative of, a Section 2 claim as set forth in the Senate Report. These "Senate factors" include:

> 1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the election of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

> Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. And whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See Senate Report at 206-07 (citing White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)).

This list is not exhaustive--it is not required that any number of the factors be proved and other factors may be relevant. Gingles, 478 U.S. at 45. The Court did note, however, that "the most important Senate Report factors bearing on Section 2 challenges to multi-member districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" Gingles, 478 U.S. at 49 n.15 (quoting U.S.C.C.A.N. 1982 at 206).

The Court, however, set forth the following important limitations on the extent to which these factors establish liability under Section 2:

> [W]hile many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice.

Gingles, 478 U.S. at 48.

The Court then listed three circumstances which "are necessary preconditions for multi-member districts to operate to impair minority voters' ability to elect representatives of their choice." Gingles, 478 U.S. at 49-50. These preconditions are:

1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;

2) the minority group must be able to show that it is politically cohesive

3) the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it in the absence of special circumstances, such as the minority candidate running unopposed usually to defeat the minority's preferred candidate.

The purpose of the first requirement is to determine whether "minority voters [would] possess the potential to elect representatives in the absence of the challenged structure or practice." Gingles, 478 U.S. at 50 n.17. As the Gingles court noted, because a minority population which is spread evenly throughout the district "cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure," they cannot maintain that the multimember electoral system itself dilutes the voting strength of the minority voters. Gingles, 478 U.S. at 50 n.17.

Thus far, the Supreme Court has not spoken as to whether the Gingles analysis applies when a court is faced with a challenge to single member districts. District courts are divided on this issue with the courts in Armour v. Ohio, 775 F. Supp. 1044 (N.D. Ohio 1991), Illinois Legislative Redistricting Commission v. LaPaille, 782 F. Supp. 1272 (N.D. Ill. 1992), and Emison v. Growe, 782 F. Supp. 427 (D. Minn. 1992), jur. noted, 112 S.Ct. 1557, motion gr. 1992 U.S. LEXIS 3673 (1992), holding that the Gingles preconditions do not apply to a single-member district plan, and the courts in Hastert, 777 F. Supp. 634, and DeBaca v. County of San Diego, No. 91-1282-R(M), 1992 WL 114049 (S.D. Cal. May 11, 1992) holding that they do.[18] We find the approach taken by Hastert and

---

[18] Other courts have held that these preconditions also apply to cases involving challenges to single-member districts. See, e.g., Hastert v. State Bd. of Elections, 777 F. Supp. 634, 639 (N.D. Ill. 1991) (three-judge court); Gunn v. Chickasaw County, 705 F. Supp. 315, 318 (N.D. Miss. 1989); McDaniels v. Mehfoud, 702 F. Supp. 588, 591-92 (E.D. Va. 1988).

DeBaca to be persuasive and accordingly turn to examining the Gingles factors.

Of course, the effect of proving these three preconditions is an open question in this circuit. In Solomon v. Liberty County, Florida, 899 F.2d 1012 (11th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 670 (1991), this circuit divided 5-5 as to the legal effect of proving the three Gingles factors. Because we find a Section 2 violation under either Judge Kravitch's or Judge Tjoflat's approach, the court need not address the conflict raised in Solomon. In other words, this court concludes that the plaintiffs have satisfied each of the three elements Gingles requires and that when considered together with the Senate factors, the "totality of the circumstances" show that with respect to Florida's Senate Plan, Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act. Additionally, under the totality of the circumstances, Hispanic vote dilution exists in Dade County under Florida's House Plan.

B. Application of the Gingles Factors

1. Sufficiently Large and Geographically Compact

a. Sufficiently Large (Citizenship)

The Gingles court stated that in order to state a claim under Section 2, the minority group must show that it is sufficiently large to constitute a majority in a single member district. There is some dispute as to whether the term "majority" as used in Gingles refers to a numerical majority or a voting majority, and therefore, whether a court should focus on voting age population or total

population as the measure of opportunity within a given district. See Burton v. Sheheen, slip op. at 45-6 (citing McDaniel v. Mehfoud, 708 F. Supp. 754, 756 (E.D. Va. 1989). Although the Burton court noted that the Ninth Circuit has held in Garza v. County of Los Angeles, 918 F.2d 763, 774-76 (9th Cir. 1990), cert. denied, 111 S.Ct. 681 (1991) that total population may be an adequate measure of minority opportunity,[19] it followed the holdings of both McDaniel and McNeil v. Springfield Park District, 851 F.2d 937, 944-45 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989) and concluded that "political opportunity is best measured in terms of minority voting age population." Burton, slip op. at 46-7.

This court has previously indicated its view that the VAP is the relevant inquiry as concerns redistricting,[20] and we adopt the rationale and conclusion of the Burton court that voting age population (VAP) rather than total population provides a better measure of opportunity within a given district to elect a candidate of choice. Creating districts containing a bare majority VAP of minority groups such as African-Americans and Hispanics, however, will not necessarily remedy a Voting Rights Act violation because, even if minorities constitute fifty percent of the overall population or voting age population in a district, they may not make up fifty percent of the voters. See Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), cert.

---

[19] But see Romero v. City of Pomona, 883 F.2d 1418, 1426 (9th Cir. 1989) (eligible minority voters, rather than total minority population, is the appropriate measure of geographical compactness).

[20] Document 411 at 8; Tr. V-40.

denied, 471 U.S. 1135 (1985) The court found in Ketchum that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice." Ketchum, 740 F.2d at 1413. According to the experts, there are four key reasons why a supermajority of minority VAP is necessary to create effective minority districts:

> (a) there are typically more aliens among minority (especially Hispanic) populations; (b) the voting age population is typically a lower proportion of the total population among minorities; (c) registration rates are often lower among minorities; and (d) turnout rates are often lower among minorities.

Kimball Brace, et al., Minority Voting Equality: The 65 Percent Rule in Theory and Practice, 10 Law & Policy 43, 47 (1988) (emphasis in the original).

An Hispanic supermajority of the VAP is necessary to account for the fact that many Hispanics are noncitizens and have lower voter registration rates. Document 438 (Congressional Opinion) at 16. This fact is not disputed by any party and is confirmed by the testimony of Dr. Moreno: "[t]he nature of tripartite politics in Dade means that only when Hispanics have a super majority can a Latin candidate win." Affidavit of Dr. Dario Moreno (document 471 at 27). Because the issues in this case were whether a fourth majority Hispanic Senate district and whether a tenth and eleventh majority Hispanic House district could be drawn in Dade County, much of the testimony revolved around what constituted a "supermajority" of Hispanic

VAP sufficient to enable Hispanics to elect a candidate of their choice.

Much of the testimony addressed the "65 percent rule" and the impact of citizenship on the voting age population. The 65 percent rule states that "barring exceptional circumstances, a district should contain a black [or Hispanic] population of at least 65 per cent (or a voting age population of at least 60 percent) to provide blacks [or Hispanics] with an opportunity to elect a candidate of their choice." Brace, supra at 44. The origin of this rule has been traced to the United States Supreme Court case of United Jewish Organizations, Inc. v. Carey, 430 U.S. 144, 97 S.Ct. 996 (1977) and has been subsequently addressed in Ketchum and Neal v. Coleburn, 689 F. Supp. 1426 (E.D. Va. 1988). According to Kimball Brace, the foundation of the rule is suspect:

> Legend has it that the rule came about because someone in the Justice Department took 50 percent and simply added 5 percent to compensate for the higher proportion of Hispanic noncitizens, 5 percent for lower Hispanic voting age population (VAP) and 5 percent for lower Hispanic registration and turnout.

Brace, supra, at 44.

In his testimony before the court in Ketchum, 740 F.2d at 1415, Mr. Brace stated the rule in a slightly different way:

> [The 65 percent rule] is derived from the 50 percent total population, adding five percent

> for each of the three factors that are voting age population, because minorities tend to have a lower voting age population, lower registration patterns and a lower turnout pattern.

In accord, Jeffers v. Clinton, 756 F. Supp. 1195, 1199 (E.D. Ark. 1990)(three-judge court), aff'd, 111 S. Ct. 662 (1991) (citing Smith v. Clinton, 687 F. Supp. 1361, 1362-63 (E.D. Ark. 1988) (three-judge court), aff'd, 488 U.S. 988 (1988)). Whereas in Clinton and Ketchum. Mr. Brace would supplement the 50 percent majority figure by five percent each for low voter registration and low voter turnout (for a total of ten percent), in his law review article, he would supplement the 50 percent majority figure by five percent total for low registration and turnout.

For this and other reasons, the 65 percent rule is not universally accepted by experts and has been modified or rejected by some courts.[21] See, e.g., Tr. VI-6 (Dr. Weber). The court in Rybicki v. State Board of Elections, 574 F. Supp. 1147, 1149 (N.D. Ill. 1983) stated that:

> The 65% figure is a general guideline which has been used by the DOJ reapportionment experts and the courts as a measure of the minority population in a district needed for minority voters to have a meaningful oppor-

[21] While some experts, such as Dr. Arrington, would still attempt to create Hispanic districts containing Hispanic VAPs of 65%, Affidavit of Dr. Arrington (Exhibit to document 474 at 6), other experts, such as Dr. Weber, would not.

> tunity to elect a candidate of their choice. The 65% guideline, which the Supreme Court characterized as "reasonable" in [Carey], takes into account the younger median population age and the lower voter registration and turnout of minority citizens.

The court in Coleburn noted that

> [T]he general 65% guideline for remedial districts is not a required minimum which the plaintiffs must meet before they can be awarded any relief under § 2 of the Voting Rights Act. Rather, the 65% standard is a flexible and practical guideline to consider in fashioning relief for a § 2 violation.

Coleburn, 689 F. Supp. at 1438. The Coleburn court noted that the 65% figure is an "approximation of the type of corrective supermajority that may be needed in any particular case" which may have to be "reconsidered and adjusted in light of 'new information' and changing circumstances." Coleburn, 689 F. Supp. at 1438 (citing Ketchum, 740 F.2d at 1416 pp.20, 21).

In his affidavit, Dr. Arrington indicates why he and other experts have modified the 65% rule insofar as it affects African-Americans:

> [B]ecause minority communities are now better organized and minority citizens more likely to register and vote than was true in an earlier era [,i]t is not always necessary to have a 60% [African-American VAP district] to assure blacks the opportunity to

> elect candidates of their choice. Although a 60% black VAP is probably still a good goal, 55% black VAP is almost always enough for black citizens to have an opportunity to participate in the political process and elect candidates of their choice.

Affidavit II of Dr. Arrington (exhibit to document 474). The court in Ketchum similarly concluded that a 65% supermajority of African-American VAP might no longer be necessary to ensure African-Americans a chance to elect a candidate of their choice and advised district courts to reconsider that figure in light of new information and statistical data:

> For example, we note that the Rev. Jesse Jackson's 1984 presidential candidacy has apparently stimulated black registration and turnout nationally. More specific to Chicago, we understand that the November 1982 gubernatorial election in Illinois and the 1983 Chicago mayoral election indicated a marked increase in black registration and turnout. If these and other elections should demonstrate a significant and consistent change in voting behavior in Chicago applicable to aldermanic elections, there would have to be a corresponding change in redistricting practices and legal standards[.]

Ketchum, 740 F.2d at 1416 n.21.

The testimony in this case also showed that African-Americans turn out in much higher rates than Hispanics. Tr. VI-282-83 (Lisa Handley).

The effectiveness of the African-American majority districts created by the Florida House and Senate plans is not in dispute. The African-American VAP in these districts ranged from 50.96% to 57.24% in the House districts and from 51.7% to 52.5% in the Senate and no party has attempted to argue that these districts would not result in an African-American candidate of choice being elected.[22] Thus we find that a district with an African-American majority VAP is an effective district which gives African-Americans a potential for electing candidates of their choice. Accordingly, the NAACP's proposed three African-American districts satisfy the "sufficiently large" requirement. The only question, therefore, is whether the VAP in the proposed one additional Hispanic Senate district and two additional Hispanic House districts would enable Hispanic voters in these districts to elect candidates of choice without impairing the VAPs in the surrounding 3 Hispanic Senate and 9 Hispanic House districts.

Plaintiffs' own witness testified that an Hispanic Senate district containing 55% Hispanic VAP[23] would be "problematic" inasmuch as the VaP would be too low to guarantee that the district would result in the election of the Hispanic candidate of choice. Tr. II-66. Plaintiffs submitted evidence, however, that a district containing 59 percent

---

[22] There was testimony that because districts containing a simple majority of African-American VAP would elect an African-American candidate of choice, districts containing 57 or 58 percent African-American VAP are designed to waste African-American votes and are, therefore, "packed." Tr. VI-135-36.

[23] District number 35 in the De Grandy Senate plan.

Hispanic VAP would enable Hispanics to elect a candidate of choice.[24] Specifically, Dr. Lichtman testified that

> Once the Hispanic concentration reaches a certain point, then all those districts seem to elect Hispanics, but below that given point, none of the districts seem to elect Hispanic. . . .[N]o candidate of choice of the Hispanic . . . has been elected in districts below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates

Tr. III-24. Dr. Lichtman concluded that the Hispanic VAP of 62.1 percent in district 40 provided Hispanics a "realistic opportunity" to elect a candidate of choice in that district.[25] Tr. III-30, 67-8. Dr. Lichtman's assessment included adjusting for the lower Hispanic voter turnout. Declaration of Dr. Allan J. Lichtman at 2. Although Dr. Lichtman had previously recommended to the Dade County commission that they attempt to create "rock solid" majority Hispanic districts containing 65% Hispanic VAP and "rock solid" majority African-American districts containing 55% African-American VAP, these districts were created "for an entirely different purpose" and he

---

[24] Javier Souto had repeatedly been reelected in a district containing 59% Hispanic VAP. Tr. II-153.

[25] The fourth proposed Hispanic district in the De Grandy plan contained 55% Hispanic VAP. The De Grandy plaintiffs seemed to agree that the Reaves/Brown plan (where the fourth proposed Hispanic district contained 62.1% Hispanic VAP) would be more effective.

"erred on the side of making sure that [these] seats would be safe." Tr. III-94, III-233. He then reaffirmed his conclusion that "a 62 percent district, while not an absolute lock . . . certainly comes well within the range to provide Hispanic voters a realistic potential to elect candidates of their choice." Tr. III-94.

Defendants, on the other hand, submitted evidence that after accounting for the lower level of citizenship for Hispanics, some of the newly created Hispanic districts would not be effective. In other words, although the Hispanic VAP might indicate that these districts would tend to elect a Hispanic candidate of choice, because the number of Hispanic citizens (as opposed to voting age residents) did not constitute a majority, Hispanics would not be able to elect a candidate of choice without relying on a certain percentage of white-crossover votes. According to defendants, the creation of these two additional Hispanic districts would do nothing more than dilute the Hispanic citizen VAP in the remaining nine districts and would result in a decrease in safe Hispanic districts.

In support of their argument, defendants cite De Grove's testimony that after adjusting for citizenship, a district containing 66% Hispanic VAP would have less than 50% Hispanic voters.[26] Tr. VII-26, 29. Defendants further note that citizenship levels vary among Hispanic

---

[26] De Grove testified that 32% of the population (Anglo, African-American and Hispanic combined) in Dade County are not citizens. Tr. VII-20-1. Furthermore, he testified that in a hypothetical tract containing a 100% Hispanic population, 55% of the tract's population would be non-citizens. Tr. VII-23.

districts--older, settled Hispanic neighborhoods in the central part of the city will have higher citizenship levels than the neighborhoods which attract more recent arrivals.[27] Tr. VII-49. Whereas according to Dr. Weber, Cubans have a higher citizenship rate than other groups, Tr. V-26, Dr. Moreno testified that due to the high number of recent Hispanic arrivals tending to settle in the South Beach area, there was a "higher level of [Hispanic] non-citizenship and a higher level of [Hispanic] non-registration" in South Beach than in other areas of the city. Tr. II-72-73. Because of this, plaintiffs' proposed 35th Senate district would not be an effective district. Tr. II72. Plaintiffs responded by noting that their proposed 35th district does not consist entirely of South Beach; rather, the lack of Hispanic citizens in South Beach is balanced by the highly concentrated Hispanic areas of Little Havana.

Defendants also argued that plaintiffs were changing their position. According to defendants, in the congressional redistricting hearings, plaintiffs had contended that a 65% supermajority was necessary for Hispanics to elect a candidate of choice, but now they contend that a 59% or 62% supermajority would allow them to do so. Plaintiffs explained that the reason why plaintiffs advocated such a high VAP for the Hispanic congressional districts was because only two districts were being formed.[28] Because

---

[27] Although it would be possible to estimate the citizenship levels on a tract by tract basis, the smaller sample size (district versus county) would present statistical problems. Tr. VII-52.

[28] In our order dated May 29, 1992, however, this court found that a supermajority was necessary. The

everyone agreed that only two Hispanic districts would be drawn, "it ma[de] sense to hedge your bet and make those districts as Hispanic as possible." Tr. II-115. See also Tr. II-67-8. Furthermore, according to Dr. Arrington, a higher minority VAP is necessary for congressional districts to perform than for state legislative districts to perform:

> One would certainly want a somewhat higher black VAP for Congressional districts than for the state legislature because of the greater organization and financing necessary to conduct a campaign at that level.

Arrington Aff. at 6. Although his analysis specifically applies only to African-Americans, there is no reason to suspect it would not also apply to Hispanics.

The court finds that because minority groups have a younger population than majority groups, a supermajority of Hispanic and African-American total population is necessary in order to create an opportunity for these groups to elect candidates of their choice. Because Hispanics communities are characterized by a large number of non citizens and a lower voter registration and turnout rates, a supermajority of Hispanic VAP is necessary to create districts in which Hispanics can elect candidates of choice. Like Hispanics, African-Americans must also constitute a

---

congressional inquiry was different from the inquiry in this Section 2 case because in the former, we were merely "considering" Section 2 when formulating districts, while here we are presented with a specific challenge to the Florida plan.

supermajority of the total population of the district in order to elect a candidate of choice; however, because of the recent increase in African-American turnout and registration, a supermajority of African-American VAP is not necessary in order to elect an African-American candidate of choice. Furthermore, although the court finds that both a supermajority of Hispanic and African-American total population and a supermajority of Hispanic VAP are necessary, we decline to express these requirements as exact percentages.

The court further finds that both the Senate districts proposed by plaintiff-intervenors Reaves/Brown/Hargrett and the House districts proposed by the De Grandy plaintiffs would create districts containing effective Hispanic voting majorities. Each of the proposed Senate districts in the Reaves/Brown plan and House districts in the De Grandy plan contains an Hispanic VAP of at least 60%. Because the 65 percent rule already accounts for citizenship, making another adjustment for citizenship would overstate its importance and lead to double counting.[29]

---

[29] Specifically, the 65 percent rule is premised on the fact that many Hispanics are non-citizens and have lower voter registration and turnouts. If this were not the case, there would be no reason to create districts containing more than 50.1% Hispanic VAP. No one disagrees that because of the lower citizenship and registration/turnout rates, Hispanic districts must contain a supermajority of Hispanic VAP. As previously stated, the 65 percent rule was "arbitrarily" created to account for these problems. Thus, this court must either (1) accept or modify the 65 percent rule or (2) formulate its own methodology for estimating the number of non-citizens reflected in the Hispanic VAP

Finally, the fact that the plaintiffs themselves are satisfied with these percentages also tends to indicate the effectiveness of the proposed districts. Coleburn, 689 F. Supp. at 1438.

b. Geographical Compactness

Plaintiffs have shown that the Dade County's Hispanic population is sufficiently large and geographically compact to constitute a majority in four Senate and eleven House districts. Hispanics constitute nearly one million persons in the Dade County area, and the county has sufficient concentrations of Hispanic population that can be easily combined to create four Senate and eleven House districts that contain effective Hispanic voting majorities. Hispanics have primarily settled in three section of Dade: the Little Havana section of the City of Miami, the "West Dade area" comprising the communities of Sweetwater, Village Green, Westchester and West Kendall, and the Northwest section of the county consisting of the cities of Hialeah, Miami Springs, and their surrounding neighborhoods. Moreno Aff. at 5-6. There is also a sizeable Hispanic (mostly Mexican) farm-worker community in the Homestead area. Document 471 at 5-6. The Cuban migration patterns went from east to west--as Cubans improved economically, they moved out of the Little Havana area into the suburbs. Tr. III-12. With the exception of the Miami airport, which separates Little Havana from Hialeah and Miami Springs, the Hispanic

---

for the various districts. Because each of the districts contains a 60% Hispanic VAP and, therefore, "satisfies" the 65 percent rule, the court need not further inquire as to the Hispanic citizenship levels in each proposed district.

population forms a compact and contiguous line from Hialeah to Kendall. Tr. III-13. The two most dramatic areas of Hispanic growth in Dade County are along Miami Beach[30] and the Kendall/West Kendall area. Tr. II-14.

The African-American population is also sufficiently large and geographically compact to constitute a majority in two Senate and four House districts in Dade County.[31] The concentrations of the African-American population essentially rest in the north central portion of urbanized Dade County including Opa-Locka, Liberty City and Carol City. Tr. VI-205; II-15-16. There are also pockets of non-Hispanic African-Americans in downtown Miami (including Overtown), Coconut Grove, and Richmond Heights. Tr. II-16; VI-205. Finally, there are African-American neighborhoods in Florida City, Homestead, Goulds, and South Miami. Tr. II-16. The Allapattah area is the border zone between African-American neighborhoods (to the east) and Hispanic areas (to the west). Tr. II-15.

The court in Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D.Ill. 1991), noted that the Gingles geographical compactness requirement is not "an aesthetic concept." Hastert, 777 F. Supp. at 649. In that case, most of Chicago/Cook County's Hispanic population was "clustered into two dense enclaves, one on Chicago's near northwest side and the other on the near southwest side,"

---

[30] In 1980, Miami Beach was 30 percent Hispanic. In 1990, it is 49 percent Hispanic. Tr. II-14.

[31] The African-American population can also support another majority district in Broward/Palm Beach counties.

but that the two enclaves were "less than a mile from each other at their closest points." Hastert, 777 F. Supp. at 649. Concluding that Chicago's Hispanic community was geographically compact within the meaning of Gingles despite the fact that the clusters were separated, the court held that "[t]he separation of clusters is not indicative of the existence of two distinct communities, but appears to have occurred as a result of exogenous physical and institutional barriers." Hastert, 777 F. Supp. at 649. Despite the fact the Hispanic community existed in two separate enclaves, the court in Hastert concluded that the Chicago/Cook County Hispanic community was sufficiently large and geographically compact to constitute a single district majority. Hastert, 777 F. Supp. at 649.

Other courts have echoed the fact that compactness is not an aesthetic concept. In Dillard v. Baldwin County Board of Education, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988), the court held that "[a]n aesthetic norm, by itself, would be not only unrelated to the legal and social issues presented under Section 2, it would be an unworkable concept, resulting in arbitrary and capricious results, because it offers no guidance as to when it is met." The court in Wilson v. Eu, 1 Cal. 4th 707, 823 P.2d 545, 1992 Cal LEXIS 6 (1992), held that the compactness requirement should be used to promote the creation of functional voting districts that allow for effective representation. Specifically, the court held that

> Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency.

Eu, 1992 Cal LEXIS at 20.

In this case, plaintiffs testified that the primary difference between their House plan and the Florida House plan was that the De Grandy House plan attempted to draw the Hispanic districts from north to south while the state drew the districts from east to west. Tr. IV-22. The De Grandy/Reaves/Humphrey plaintiffs and the DOJ argue that Florida's House plan fragments and dilutes the Hispanic vote. Dr. Moreno testified that House District 116 of the Florida plan has an Hispanic VAP of 48 percent. Tr. III-263. Additionally, Dr. Moreno pointed out that the line of District 116 separates heavily Hispanic neighborhoods in District 112 from the rest of the heavily hispanic Kendall Lakes area and the Kendall area. Tr. III-263-264. Dr. Moreno concluded that the Florida plan erects a barrier between "neighbors making up the same, basically what is the same housing development in Kendall Lakes." Tr. III-264. Additionally, Dr. Moreno testified that in order to protect a white incumbent the Florida plan packs District 114 with an Hispanic VAP of over 78 percent. Tr. III-265. Dr. Moreno also pointed out that in District 102 and District 109 the State repeated the process of fragmenting Hispanic communities. Tr. III-265. This court does not find that the districts drawn by the De Grandy plaintiffs are significantly less geographically compact than those drawn by the state of Florida.[32] Nor are these districts "so

---

[32]As the court in Jeffers v. Clinton, 730 F. Supp. 196, 207 (E.D. Ark. 1989), stated:

> [S]ome of the districts [proposed by the plaintiffs] look rather strange, but we do not believe this is fatal to plaintiffs' position. Their alternative districts are not materially stranger in shape than at least some of the districts contained in the present apportionment plan. The one-person, one-vote rule inevitably requires that county lines and natural barriers be crossed in some instances, and that cities and other political and geographic units be split in others.

unreasonably irregular, 'bizarre,' or 'uncouth' as to approach obvious gerrymandering." Coleburn, 689 F. Supp. at 1437. Furthermore, these districts are "relatively compact and are in line with the configuration of electoral districts that have been approved in other cases." Coleburn, 689 F. Supp. at 1437 (citing Rybicki v. State Board of Elections, 574 F. Supp. 1082, 1146, 116667 (N.D. Ill. 1982) (three-judge court)). Finally, the court finds that the districts as drawn in the De Grandy House and Senate plans would create functional voting districts that allow for effective representation.

2. Political Cohesiveness

The testimony showed.that the Hispanics and African-Americans were each politically cohesive among themselves but were not at all cohesive--and were often at odds -- in relation to each other. See, e.g., Tr. III-35-36; Meek v. Metropolitan Dade County, 908 F.2d 1540, 1545-46 (llth Cir. 1990). There is a high degree of tension in Dade County between the African-American population and the Hispanic population. Tr. II-82. Furthermore, while African-Americans tend to vote Democratic, Hispanic voters tend to vote Republican. Tr. II-28. The focus of this Gingles prong, however, is not the joint cohesiveness

of two separate minority groups, but rather whether "Hispanics" as a group and/or "African-Americans" as a group are politically cohesive.

a. Hispanic

The total Hispanic population of Dade County is 953,407 of which 55 percent is Cuban American. Moreno Aff. at 5. It is estimated that during the 1980's, over 300,000 Latin Americans moved into Dade County. Moreno Aff. at 5. Of these, the Mariel boatlift in 1980 brought in 125,000 Cuban refugees, while Nicaraguans fleeing the Sandinista regime and civil war in 1986 and 1987 numbered approximately 79,000[33]. Tr. II-17. Thousands of Colombians, Peruvians, Hondurans, Guatemalans and Puerto Ricans also melded into Dade's flourishing Hispanic community during the 1980s. According to the 1990 census, non-Cuban hispanics account for 40.7% of the Hispanic voters in Dade County. Tr. II-86.

The testimony showed that there is a high degree of political cohesiveness among Cuban voters in Dade County although the testimony was less clear about the cohesiveness of non-Cuban Hispanics. Because Dr. Moreno focused on Hispanics as a group and not on the individual Hispanic subgroups, he was not able to form any conclusions as to voting preferences of these individual subgroups[34]. Tr. II-84-91.

---

[33] According to Dr. Moreno, this number is believed to be undercounted by 30,000.

[34] It was unclear whether this data is not available or if the appropriate analysis was not done. Tr. II-112.

In general, "the Hispanics in Dade County are distinguished from Hispanics in the other part of the country by being more conservative and much more Republican." Moreno Aff. at 16. The strong loyalty Cuban-Americans have to the Republican party is seen by their voting patterns in several elections. In 1986, Republican Bob Martinez carried the Hispanic precincts of Dade over his Democratic opponent, receiving 79 percent of the vote. Moreno Aff. at 17. In 1988, President George Bush carried the Hispanic precincts of Dade County with over 85 percent of the vote, while Senator Connie Mack carried the same districts with about 80 percent of the vote. Moreno Aff. at 16. Between 1980 and 1990, Democratic party registration among Hispanics in Dade County decreased from 49 to 24 percent, while Republican registration increased from 39 to 68 percent. Moreno Aff. at 18. The Cuban vote stands in stark contrast to that of other Latinos across the United States who have consistently supported the Democratic ticket by two-to-one margins. Moreno Aff. at 18. The cohesiveness of Dade's Hispanic community has also been buttressed by the ideological affinity of its two largest groups--Nicaraguans and Cubans. Moreno Aff. at 9. These two groups continually work together for a conservative foreign policy agenda. Moreno Aff. at 9; Tr. II-18. According to Representative Miguel De Grandy,[35]

> There is a union between Cuban-Americans, Nicaraguans and other Central Americans in basic philosophy, first to form policy because . . . they are basically political and not economic migrations, unlike other His-

---

[35] Mr. De Grandy is not testifying as an expert.

> panic sectors of the United States; they generally have a very conservative, very anti-communist political philosophy on the foreign affairs.
>
> Tr. II-145.

Dade County has a significant amount of Hispanic AfricanAmericans including immigrants from the Dominican Republic and Puerto Rico.[36] Tr. II at 33. Although Dr. Moreno testified that Dominicans identified more with the Hispanic culture than that of the African Americans, the cohesiveness of the 70,000 Dade County Puerto Ricans is less clear. Moreno Aff. at 33. According to Dr. Moreno, Dade County Puerto Ricans seem to identify with the language minority stronger than with the racial minority. Tr. II33, 84-85. Furthermore, Dade County Puerto Ricans tend to be more Republican and more conservative than their Puerto Rican counterparts in New York[37]. Tr. II-17. Nonetheless, the statistical evidence shows that Puerto Ricans tend to register more as Democrats (50%) than Republicans (40%). Tr. II-142, 179. According to Dr. Moreno, the fact that Puerto Ricans and Cubans do not

---

[36] This is significant, for example, in the 36 district where the non-Hispanic African American VAP is 49%, but the total African-American VAP is 52%. Thus, there is approximately three percent Hispanic African-American VAP in this district.

[37] In fact, "[a]ll the Hispanic ethnic groups by nationality tend to be more conservative than their counterparts in other large U.S. metropolitan areas." Tr. II-18.

share the same party affiliation does not mean that the two groups are not cohesive; rather, Hispanic Democrats tend to vote for Hispanic Republicans when they have that opportunity. Tr. II103.

According to Representative De Grandy, the various Hispanic groups tend to have very similar views in the areas of education, housing, medically needy programs" among others. Tr. II-145-6. Furthermore, the various Hispanic groups tend to have the same political philosophy in areas such as civil rights and discrimination. These groups have united to actively oppose the English only initiative. According to Dr. Moreno, "[t]he fear of language based discrimination [both in the form of English only initiatives and otherwise] has served to united Dade's Hispanic communities." Moreno Aff. at 7.

We conclude that there is a sufficient degree of political cohesiveness among Hispanics to satisfy the second Gingles prong, although there might be differences between the several Hispanic subgroups.

b. African-Americans

All of the evidence indicated that Dade County's African-American community is cohesive. Dr. Weber testified that African-Americans are "generally" cohesive and tend to vote for Democratic candidates in general elections. Tr. VI-142. Dr. Lichtman similarly testified that "blacks are politically cohesive, . . . unite in large numbers behind candidates of their choice and . . . prefer to elect black candidates when there are elections with black candidates competing against candidates of other races." Tr. III-35. Both this court and Florida Supreme Court Chief Justice

Leander Shaw have previously held that the approximately 590,000 African-American residents in the Broward/Dade/Monroe county area[38] are politically cohesiveness[39]:

> Black voters in Florida generally vote as a cohesive racial block for the black candidate when there is a black versus white choice on the ballot for a given office.

Document 411 (Report of Special Master) at 23. See also In re SJR 2G, No. 79,674 at 34-37 (Shaw, C.J., dissenting); document 388 (Report of Independent Expert to Special Master) at ¶ 10. Furthermore, the testimony received in the legislative. hearings underscore this conclusion. Accordingly, we conclude that both African-Americans and Hispanics are politically cohesive groups within the meaning of the second Gingles' prong.

---

[38] Affidavit of Thomas B. Hoeffler, document 472 at 8.

[39] African-American registration in Dade County is 90 percent Democrat. Moreno Aff. at 19. "The antipathy of Black voters to Republican candidates is illustrated in recent presidential and state-wide races [where] no GOP candidate received more than 12 percent of the Black vote." Id. African-Americans also vote heavily for Democrats in state legislative elections. Id.

3. White Block Voting

Dr. Allan J. Lichtman,[40] defines "racially polarized voting" as "the extent to which members of distinct racial or ethnic groups support different candidates of their choice." Affidavit of Dr. Lichtman, Government Exhibit 46 at ¶ 4; Tr. III-13. Racially polarized voting can be subdivided into two parts: minority cohesion, which is the extent to which minority voters support candidates of their choice, and white bloc voting, which is the extent to which whites support different candidates. Government Exhibit 46 at ¶ 4. According to Dr. Lichtman, "[r]acially polarized voting is politically significant if, under a given electoral system, it impedes the opportunities for minority voters to elect candidates of their choice." Government Exhibit 46 at ¶ 4.

There was a substantial amount of testimony--both during the Congressional redistricting hearings and the state legislative hearings -- that voting in Dade County is racially polarized. The court notes Chief Justice Leander Shaw's conclusion in In re Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992. No. 79-674, slip op. at 34-37 (Fla. May 13, 1992) (Shaw, C.J., dissenting) that "[t]he results of Florida's legislative elections over the past ten years established the presence of racially polarized voting." Likewise, Dr. Arrington stated that "most elections involving both Afro-Americans and Hispanics are racially polarized." Arrington Aff. at 1. Furthermore, according to Dr. Lichtman

---

[40] Dr. Lichtman is a professor of history and formerly Associate Dean of the College of Arts and Sciences at The American University in Washington, D.C.

> The results reported in Table 1 [exhibit to government exhibit 46] show a clear pattern of racially polarized voting, Hispanic cohesion, and white bloc voting. It also shows that black voters united with white voters in opposition to Hispanic candidates for Senate and House positions[41] . . . . The results reported in Table 1 likewise show a pattern of strong bloc voting by whites for non-Hispanic candidates [. . . and] indicate that blacks joined with whites in opposing Hispanic Senate and House candidates. . . . These findings of Hispanic cohesion and white bloc voting are supported by the analyses of additional local elections in Dade County.

Lichtman Aff. at ¶¶ 6-9; See also Tr. III-18-19. Furthermore,

> The high degree of racially polarized voting documented for legislative elections in Dade County indicates that Hispanic voters would

---

[41] "In every election studied, Hispanics voted for Hispanic candidates in greater proportion than either whites or blacks. The results reported in Table 1 show a pattern of strong political cohesion. By generally overwhelming majorities, Hispanic voters preferred to elect Hispanic candidates to state legislative positions. In 11 of 13 elections for the Senate of House, ecological regression results show that more than 75 percent of Hispanic voters opted for the Hispanic candidates." Government Exhibit 46 at ¶ 6.

> have an opportunity to elect candidates of their choice only in Districts with Hispanic voting-age majorities. Otherwise white bloc voting would usually be sufficient to defeat the candidate of choice of Hispanic voters.

Lichtman Affidavit at ¶ 10. Finally, the reports prepared by consultants for the state also recognize that because of the strong polarization between Hispanics and non-Hispanics in Dade County, opportunities for Hispanics to elect candidates of their choice are impeded. Lichtman Aff. at ¶ 11.

According to Dr. Moreno, Dade County is profoundly divided by the competing interests of three distinct and separate ethnic groups-- African American, Hispanic, and Non-Hispanic White -- each of whom has different social and economic interests. Moreno Aff. at 3. According to Dr. Moreno, "[t]he division of Dade along ethnic lines has made Miami the contemporary symbol of racial upheaval in America." Moreno Aff. at 3. There is a "high degree of tension in Dade County between the Afro-American population and the Hispanic population." Tr. II-82. Furthermore, the division of the three major ethnic groups has led to the development of tripartite politics in Miami; that is, ethnic factors between the three communities predominate over all other factors in Dade politics.

According to Dr. Moreno, "[m]inorities are usually only able to elect their candidates when they are firmly in the majority." Moreno Aff. at 20. Furthermore, "white candidates are aided by the deep cleavages between Republican Hispanics and Democratic Blacks." Moreno

Aff. at 3. According to Dr. Moreno, there are four types of racially polarized elections in Miami:

> First, [there] are races featuring a Hispanic candidate versus a White candidate with Black[s] supporting the White candidate; Second, a Black candidate versus a White candidate with Hispanic voters supporting the White candidate; third, a Black candidate versus a Hispanic candidate with White voters holding the balance of power, and finally the[re] are races between two candidates of the same ethnic group in which voters from the other two group[s] support the least ethnic of the two candidates.

Moreno Aff. at 21.

Dr. Moreno cites specific examples of recent races in which ethnic factors predominated over all others including the congressional race between Gerald Richman and Ileana Ros-Lehtinen where "[t]he campaign strategies of both campaigns were based purely on ethnic calculations." Moreno Aff. at 23. CubanAmericans, offended by the perceived racism of Richman, voted for Ros-Lehtinen by a margin of 88 to 12 percent. Although Richman carried all of the other blocs of voters--Jewish, Anglo, and Black-because these voters represented only 47 percent of the electorate, Richman lost the race. According to Dr. Moreno, "RosLehtinen won simply because more Cubans voted and almost all of them voted for Ros-Lehtinen." Moreno Aff. at 24.

In 1990, two Hispanic incumbents almost lost their seats in the state legislature to non-Hispanic White challengers. Moreno Aff. at 26-27. Javier Souto was barely re-elected to the State Senate from the 40th district when Tom Easterly won 74 percent of the non-Hispanic White vote and 92 percent of the Black vote.[42] Moreno Aff. at 26-27. Souto was able to defeat his Anglo opponent by winning over 80 percent of the Hispanic vote. State Representative Al Gutman also nearly lost his 105 district seat to a non-Hispanic White candidate. His challenger, Steve Leifman, won 42 percent of the vote in this heavily Hispanic district by carrying two-thirds of the non-Hispanic White vote and 83 percent of the African-American vote. Gutman survived by winning 92 percent of the Hispanic vote. In another race, Hispanic challenger Orlando Cruz was easily defeated by incumbent Art Simon in an ethnically polarized election in the 116th District despite the fact that Cruz carried 77 percent of the Latin vote. Moreno Aff. at 26-27; Tr. II-109. According to Dr. Moreno, "this pattern of ethnic polarized voting against Hispanics was not restricted to the 1990 elections." Moreno Aff. at 27. Rather, "[t]he pattern of bloc voting by non-Latin Whites and Blacks against Hispanics is found in elections at all levels against both Latin challengers and incumbents." Moreno Aff. at 27.

African-Americans have also been the victims of block voting. According to Dr. Moreno, "Black candidates faced with a WhiteHispanic coalition and lacking adequate finances have largely been limited to running in the three state House districts (106, 107, 108) and in the one state

---

[42] In his live testimony, Dr. Moreno stated that even fewer African-Americans crossed over (3.7%). Tr. II-95.

Senate district (36) where Blacks comprised an overwhelming majority." Moreno Aff. at 28. In 1986, Bob Starks, a White Republican, barely beat Nathaniel Edmond, an African-American Democrat in the general election for state House district 118. Despite the fact that Democrats out-registered Republicans in this district 21,202 to 9,968, Stark won by carrying nearly all of the White votes in the district. This occurred despite the fact that Edmond had the support of almost all of the African-American voters.[43] In 1990, Darryl Jones, a African-American Democrat won the election despite losing the white vote. Jones beat John Minchew 64 to 36 percent because more African-Americans turned out at the polls and he carried enough of the White vote (24 percent) to put him over the top. Moreno Aff. at 29. According to Dr. Moreno, block voting is not limited to legislative races, for "Black[] candidates have also fared poorly in seeking county-wide office." Moreno Aff. at 29.

4. Additional Findings

The history of discrimination against African-Americans in Florida was addressed in depth in our order of May 29, 1992 and will not be restated here. See document 438 at 2-3.

The court also finds sufficient evidence of language based discrimination against Dade County Hispanics.

---

[43] Although blacks comprise only 29 percent of the population of this district, they exert greater influence because most of the Hispanics in this district are not United States citizens. Thus, African-Americans represent over one third of the registered voters in this district.

According to Dr. Moreno, "[t]he fear of an anti-Spanish backlash has been reinforced by English only initiatives, at both the county and state level, which seem to be specifically aimed at Miami's Latin population." Moreno Aff. at 7. In his affidavit, Dr. Moreno also cites specific examples of language based discrimination including the suspension of a supermarket clerk for speaking Spanish in front of customers and the refusal of a personnel agency to refer people with foreign accents to job openings at a Miami bank. Moreno Aff. at 8-9.

The record clearly established that Florida's minorities have borne the social, economic and political effects of this discrimination. This is true despite the fact that Cubans have fared relatively well in South Florida. Although Miami has a Cuban mayor and South Florida is the home of three Cuban state senators, Tr. II-101, language based discrimination still exists in South Florida. While the witnesses disagreed as to whether Hispanics or African-Americans bore more of the brunt of discrimination, everyone agreed that both groups had suffered.[44]

---

[44] Representative Burke felt that African-Americans have suffered greater discrimination than Hispanics. Tr. VII-126. Dr. Weber similarly testified that "African-Americans have had greater difficulty than Hispanic Americans" in achieving political empowerment in South Florida. Tr. VI-145. Likewise, Dr. Moreno testified that

> Blacks are also the most disadvantaged of the three major ethnic groups that live in the Greater Miami area. In all social-economic indicators[,] Afro-Americans are the worst

In fact, as a result of this discrimination, the United States DOJ must preclear five Florida counties pursuant to Section 5 of the Voting Rights Act, as amended. § 1973 et seq. Those counties are Collier, Hardee, Hendry, Hillsborough and Monroe.[45]

In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that Florida's Senate reapportionment plan dilutes the voting strength of Hispanics in Dade County and the surrounding areas. Additionally, plaintiff NAACP has established that Florida's Senate reapportionment plan dilutes the voting

---

off of Dade [C]ounty's citizens.

> . . . Miami's Black community facing discrimination, poverty, and not participating in local decision-making has erupted in violence four times during the 1980's.

Moreno Aff. at 11-12. Plaintiff Darryl Reaves testified that there was discrimination against both Cubans and African-Americans and could not state which group has been most victimized. Tr. V-132.

[45]These five counties are subject to the Section 5 preclearance requirement because they provided election information only in the English language when more than five percent of the voting age citizens were Spanish-speaking, and fewer than fifty percent of them were registered to vote or voted in the 1972 Presidential Election. See 41 Fed. Reg. 34329 (August 13, 1976); 40 Fed. Reg. -- (September 23, 1975).

strength of African-Americans in Dade County and the surrounding areas. With respect to Florida's House reapportionment plan, all of the parties have agreed that Florida's plan fragments the African-American community in Escambia County.[46] The DOJ and the De Grandy/Reaves/Humphrey plaintiffs have also established that Florida's House reapportionment plan dilutes the voting strength of Hispanics in Dade County. We must now fashion a remedy.

III. REMEDY

A. The Senate

Florida's new Senate plan (Plan 330) creates five minoritymajority districts of which two have African-American voting age population (VAP) majorities and three have Hispanic VAP majorities. The three Hispanic VAP majority districts and one of the AfricanAmerican VAP majority districts are contained wholly within Dade County. The other African-American VAP majority district is contained in the South Florida counties of Broward and Palm Beach. In the three Hispanic VAP majority districts,

---

[46] All plaintiffs and the defendants agreed that voting is racially polarized in Escambia County, and that the African-American population in Escambia County is large, compact, and concentrated in the Pensacola area. Additionally, the parties agreed that Florida's House plan split the politically cohesive community in Escambia County into several districts. Thus, the parties agreed to a consent judgment which formulated new House districts in the Escambia County area uniting the African-American population of the Pensacola area. (Doc. 548).

Hispanics constitute the following percentages of the VAP: (1) District 34 -- 66.3 percent; (2) District 37 -- 64.3 percent; and (3) District 39 -- 76.1 percent. African-Americans constitute 52.5 percent of the VAP of District 36 in Dade County, and 51.7 percent of the VAP in the Broward/Palm Beach district, District 30. The Senate reapportionment plan creates seven Dade County districts of which five districts are wholly within Dade County and two additional districts are comprised of portions of Dade County and the surrounding areas.

The DOJ and the De Grandy/Reaves/Humphrey plaintiffs take exception to Florida's Senate reapportionment plan as it pertains to Dade County because the state's proposed plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the VAP only in three districts. Specifically, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs point out that as a result of Florida's Senate reapportionment plan 28.55 percent of the Hispanic population of Dade County will reside in state Senate districts that Hispanics will have no possibility of winning. See Moreno Aff. at 32-38. The DOJ and the De Grandy/Reaves/Humphrey plaintiffs contend that if the racial and ethnic population concentrations existing in the Dade County area are divided into equally populated Senate districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, Hispanics would constitute a significant voting age majority of the population in an additional Senate district. In our order dealing with congressional redistricting, we held that "the voting age population (VAP) is the relevant number to be used in determining whether minorities in a particular district will be able to elect a candidate of their choice." De Grandy v. Wetherell, Nos. TCA 92-40015-WS, 92-40131-WS, slip

op. at 16 (N.D. Fla. May 29, 1992) (citing Solomon, 899 F.2d at 1018. The court in Ketchum explained that VAP is the best measure of minority voting strength because age is a legal prerequisite to voting and minority groups generally have a younger population which comprise a large proportion of the individuals who are ineligible to vote. Ketchum, 740 F.2d at 1412-1413. Because minority groups generally have a younger population than majority groups, the use of VAP as the relevant number for creating minority-majority districts requires that minority groups constitute a supermajority of the total population of an electoral district. See Ketchum, 740 F.2d at 14121413.

Additionally, our congressional order held that "because Hispanic communities are characterized by a large number of noncitizens and lower voter registration rates, a supermajority of the VAP is necessary to create districts in which Hispanics can elect candidates of their choice." De Grandy, Nos. TCA 92-40015-WS, #240131-WS, slip op. at 16. In determining whether a fourth district can be created in which Hispanics constitute a supermajority of the VAP, we must consider "emerging changes in sociological and electoral characteristics of minority groups and broad changes in political attitudes." Ketchum, 740 F.2d at 1416. These changes may alter, or eliminate the need for a supermajority corrective figure. Ketchum, 740 F.2d at 1416.

In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that Hispanics can elect candidates of their choice in Dade county and its surrounding areas when the Hispanics constitute at least 59 percent of an electoral district's VAP. Dr. Lichtman testified that in Dade County and its surrounding areas "[n]o Hispanic candidates have been elected in districts

below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates." Tr. III-24. Based on the record as a whole, we find that the electoral characteristics of Hispanics in Dade County indicate that 60 percent is an appropriate guideline for determining if a fourth Hispanic VAP supermajority district can be created in the Dade County area. We note, however, that in areas with high concentrations of recent Hispanic arrivals, such as the South Beach area of Miami, an effective VAP supermajority district must have a VAP higher than our 60 percent guideline level. Tr. II-55.

The De Grandy/Reaves/Humphrey plaintiffs have established that four geographically compact districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice. Plaintiff Reaves submitted Plan 180 which creates four Hispanic VAP supermajority districts. In Plan 180's four majority Hispanic districts, Hispanics constitute the following percentages of the VAP: (1) District 33 -- 66.8 percent; (2) District 34 -- 65.0 percent; (3) District 35 -- 65.7 percent; and (4) District 40 -- 62.1 percent.[47] Although

---

[47]Plaintiff De Grandy, on the other hand, submitted plan 275 which also contains four Hispanic voting age population majority districts. In plan 275's majority Hispanic districts, Hispanics constitute the following percentages of the voting age population: (1) District 33 -- 71.5%; (2) District 34 -- 66.1%; (3) District 35 -- 55.0%; and (4) District 40 -- 66.2% (Plan 275). District 35 in this plan falls short of our 60 percent guideline and De Grandy's own expert, Dr. Moreno, admitted that district 35 was "problematic" because its 55 percent VAP

this plan remedies the dilution of the Hispanic vote, we must examine the extent to which the plan addresses the African-Americans' vote dilution claim.

Plan 180, like Florida's Senate plan, creates two African-American VAP majority districts. Nevertheless, these two districts do not fully address the vote dilution claim of African-Americans. The NAACP takes exception to Florida's Senate reapportionment plan as it pertains to Dade County and the surrounding areas because the state's proposed plan fragments the African-American population concentrations such that African-Americans comprise a majority of the VAP in only two South Florida districts. Specifically, the NAACP contends that if the racial and ethnic population concentrations existing in the Dade County area are divided into equally populated Senate districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, African-Americans would constitute a voting age majority of the population in an additional Senate district.

Like Hispanics, African-Americans must also constitute a supermajority of the total population of a district in order to be able to elect candidates of their choice due to a young population. See Ketchum, 740 F.2d at 1412-1413. African-Americans, however, may not need

---

was probably too low for Hispanics to be able to elect candidates of their choice. Tr. II-66. Additionally, this district includes the South Beach area of Miami which contains a large number of recent arrivals who are non-citizens. Tr. IV-158. This additional fact makes this 55 percent district unacceptable and we reject plan 275 as a viable option.

a supermajority of the VAP of a district because the minority group has experienced changes in its electoral characteristics. We take judicial notice of the fact that Jesse Jackson's 1984 and 1988 presidential campaigns stimulated AfricanAmerican registration and turn-out nationally. See Ketchum, 740 F.2d at 1416 n.21. Thus, we find that because of changing AfricanAmerican electoral characteristics, a simple majority of the VAP is an appropriate guideline for determining if a third African-American majority VAP district can be created in the Dade County area.

The NAACP has established that three geographically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP majority districts. Two of the African-American VAP majority districts consist of Dade County area residents with one district spilling over into areas of Broward County. The other South Florida African-American VAP majority district is in the Broward/Palm Beach area and is comparable to the Broward/Palm Beach district in Florida's Senate reapportionment plan. In the NAACP plan's three African-American VAP majority districts, African-Americans constitute the following percentages of the VAP: (1) District 39 in Dade -- 51.7 percent; (2) District 37 in Dade and Broward -- 53.6 percent; and (3) District 35 in Broward and Palm Beach -- 51.6 percent. This plan's creation of three African-American VAP majority districts remedies the dilution of the African-American vote in the South Florida, however, it fails to address the vote dilution claim of Hispanics in Dade County because the plan only creates three Hispanic VAP supermajority districts.

This court is faced with two independent, viable Section 2 claims in South Florida and our remedy must address both of those claims. An ideal solution would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts in South Florida. The evidence in this case, however, established that the ideal remedy for the Section 2 violations in this case is not a viable option. During the course of the examination of John Gutherie, Staff Director of the Senate Committee on Reapportionment, the court inquired about the possibility of creating a plan containing four Hispanic and three African-American districts.

> JUDGE HATCHETT: Yes, he has the answer. I have a question, though. From all of your experience working in South Florida, is it possible to draw four VAP majority Hispanic districts and three majority black districts?
>
> . . . .
>
> THE WITNESS: It's amazing, Your Honor, what you can do with these computers. . . .

If you ask me would I believe that you could do it, I would believe that. But it gets to the notion of -- because of numerosity -- of how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accomplish that.

> JUDGE HATCHETT: You've answered my question.

Tr. IV-194-195. In trying to create a plan with four Hispanic supermajority VAP districts and three African-American majority VAP districts, the NAACP was confronted with Gutherie's "numerosity" concern and his concern over how much of a margin is necessary to insure that minorities have opportunities to elect candidates of choice.

Counsel for the NAACP, Charles Burr, informed the court that "it is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable." Tr. IV217. Thus, the NAACP concluded that in order to create four Hispanic supermajority VAP districts and three African-American majority VAP districts, the number of minorities found in each district can be no more than our bare VAP majority guidelines. Additionally, the NAACP realized that these districts would contain an insufficient level or margin to ensure that minorities would have the opportunity to elect candidates of their choice.

After realizing that the NAACP had also established a Section 2 violation with respect to African-Americans, in that a third African-American VAP majority district could be created, plaintiff Reaves argued to the court that Plan 180 is in fact a "four-three plan." To establish that Plan 180 does in fact create three African-American VAP majority districts in addition to its four Hispanic VAP supermajority districts, plaintiff Reaves compared his African-American districts to those found in the NAACP's plan. Plaintiff Reaves contends that the NAACP's District

37, which is comprised of Broward and Dade Counties, is comparable to Plan 180's District 32 which also covers Broward and Dade County. Additionally, Reaves points out that the NAACP's District 39 which is wholly within Dade County, is comparable to Plan 180's District 36 which is also wholly within Dade County. Finally, Reaves argues that District 35 in the NAACP plan, a Broward/ Palm Beach Senate seat, is comparable to Plan 180's District 28 which goes through Broward and St. Lucie County. Thus, plaintiff Reaves asserts that Plan 180 creates, in essence, three African-American VAP majority districts without diluting the Hispanic vote.

Contrary to the assertions of plaintiff Reaves, we find that Plan 180 does not create three African-American majority VAP districts, and in fact, dilutes the African-American vote. Plan 180's third "African-American seat," District 28, does not contain an African-American majority VAP. African-Americans in District 28 of Plan 180 only constitutes 47.1 percent of the VAP. Gutherie describes this less than majority seat as follows:

> What is sometimes referred to as an access or influence seat begins in the Pompano Beach area north of Ft. Lauderdale, proceeds up to West Palm Beach and then across the Everglades into -- the Everglades agricultural area -- into Ft. Myers and northward through St. Lucie County, Ft. Pierce into Vero Beach and Indian River County.

Tr. IV-153-54. Gutherie also points out that the configuration of District 28 is the result of Plan 180's inclusion of AfricanAmericans in Ft. Lauderdale and the adjoining

communities into District 32, the Plan's second African-American majority district which is comprised of portions of Dade and Broward Counties. Tr. IV-157. Specifically, Gutherie notes that:

> Because this large concentration population in downtown Ft. Lauderdale is not available for a further access seat or majority society north of Dade County, what Plan 180 has to do in order to accomplish that end is string a district as we discussed earlier, District 28, going from Pompano Beach north to Vero Beach and Indian River County, and west of Ft. Myers on the Gulf Coast.

Tr. IV-157-58. Thus, based on the record as a whole we find that Plan 180 does not create three African-American VAP majority districts.

Not only does Plan 180 fail to create a third African-American majority VAP district, Plan 180 is retrogressive to AfricanAmericans in Dade County and the surrounding areas. With respect to the two African-American majority VAP districts and Plan 180, Dr. Weber testified that after analyzing the turnout for those particular districts, that it was his opinion that

> based upon that analysis of turnout, the same kind of analysis I did for the Hispanic districts, that those districts are designed and I'm sorry to use these words, and they may be offensive to some people in the courtroom, but they are designed to waste AfricanAmerican votes. . . . They are packed, and there are more African-Americans than are necessary to provide a realistic opportunity for African-Americans to elect candidates of choice.

Tr. VI-135. Additionally, with respect to District 28, Dr. Weber testified that his turnout test for that district indicated that it would "fail miserably in terms of [its] ability to put AfricanAmericans in control on the general election day." Tr. VI-136. Thus, Dr. Weber concluded that Plan 180's packing of AfricanAmericans into District 32 and 36 in order to facilitate the creation of four Hispanic super-majority VAP districts, had a "decimating effect" on the possibility of creating an additional African-American majority seat in South Florida Tr. VI-136. Based on the record, we find that plan 180 creates only two African-American majority VAP districts and its third African-American access district has tested to be ineffective. Thus, Plan 180 is in essence a four/two plan which continues to dilute the African-American vote.

After considering all of the evidence, this court came to the conclusion that the remedy for the Hispanics' Section 2 claim in South Florida and the remedy for the African-Americans' Section 2 claim in South Florida were mutually exclusive. Tr. VIII-53. The State of Florida, faced with the competing interests of Hispanics and African-Americans in Dade County, sought to strike the fairest balance in its Senate reapportionment plan with respect to all the Dade County ethnic communities. The Supreme Court has held that:

> Reapportionment is primarily a matter for legislative consideration and determination . . . state legislatures have 'primary jurisdiction' over legislative reapportionment. . . .

> A federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions, or in the reapportionment plans proposed by the state legislative, whenever adherence to state policy does not detract from the requirements of the federal Constitution.

Upham v. Seamon, 456 U.S. 37, 41 (1982) (quoting White v. Weiser, 412 U.S. 783, 795 (1973)). Because state legislatures have primary jurisdiction over legislative reapportionment, we must examine the state of Florida's policy choices and preferences as we determine the proper remedy for balancing the competing minority interests in South Florida. Realizing that the creation of a fourth Hispanic VAP supermajority district would adversely affect African-Americans in South Florida and that the creation of a third VAP majority district would adversely affect Hispanics in Dade County, the Florida Senate plan reaches a compromise in that it creates three supermajority Hispanic VAP districts and two majority AfricanAmerican districts with a strong African-American influence district in the Dade County area.

The influence district in the Florida plan, as Gutherie describes,

> commences in the Liberty City/Overtown area, proceeds south through the Black Grove, Black Coral Gables, and south in Dade County through Leisure City, Richmond Heights, down and through Homestead and finally ending in Florida City.

> That district also incudes Monroe County. The overall African-American VAP of that district is 35.5 percent. The district incudes, by the way, most of current House District 118. House District 118 is a district which has 26 percent African-American VAP, 30 percent Hispanic VAP.
>
> In 1990, Tom Easterly, a white incumbent, left a seat in order to run for the Florida Senate. There was a primary, a democratic primary, which was contested by two African-Americans. Those were the only two people on the ballot. And the winner of that primary, Daryl Jones, won the general election by a margin of 65 percent over the Republican opponent.

Tr. IV-155. This influence district, District 40, in the Florida Senate reapportionment plan, creates in essence a district in which African-Americans can elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes. Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, testified that:

> The Join Resolution as adopted by the Supreme Court better represents the black community not only in Dade County, but in south Florida. And the reasons for that are very simple: first of all, the seat that's in south Dade, which is only a thirty-some-odd-percent voting age population seat, also includes non-Cuban Republican Hispanics,

> that which are the Mexican community, which have proven over a period of time that they support not only Democratic candidates, but they are willing to support black candidates. And that was an example in the Daryl Jones House seat that also was testified at the south Dade hearing by the American-Mexican community, that they prefer to be in the district that would be represented by a black versus being in a district that would was being Republican.

Tr. III-147. Additionally, Representative Logan testified that the Florida Senate reapportionment plan comported closely with the desires of African-Americans with respect to having an AfricanAmerican district based in the Ft. Lauderdale area of Broward County, and two African-American districts based in Dade County. Tr. III-156. Thus, this court finds that the Florida Senate Reapportionment Plan's Dade County African-American influence district performs as a third African-American district without adversely affecting Hispanics in the Dade County area. The court in DeBaca, noted in discussing balancing the interest between two minority groups that

> Federal courts have recognized that these political questions do exist and that the best means to resolve them is in the process of give-and-take between citizens and their elected officials. Political questions necessarily require that policy choices be made before they can be resolved. This is not a task federal courts are equipped to handle. They have recognized their shortcomings in this area, and will, whenever possible, defer

> to legislative policy choices, even if the choice is perceived to be unwise or is simply not the optimum choice.

DeBaca, 1992 WL 114049 at § 2 (citing Strange, Application of Voting Rights Act to Communities Containing Two or More Minority Groups: When is the Whole Greater than the Sum of the Parts?, 20 Tex. Tech. L. Rev. 95, 124-125 (1989)). We find that between all the plans presented to the court, the Florida Senate Reapportionment plan is the fairest to all the ethnic communities in Dade County and the surrounding areas, and is the proper remedy in this case. Consequently, this court gives deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court and imposes that plan as the remedy in this case. See Upham v. Seamon, 456 U.S. 37 (1982).

B. The House

Florida's House plan creates thirteen minority-majority districts of which nine have Hispanic VAP supermajority districts and four have African-American VAP majority districts. Eight of the nine Hispanic districts are contained in Dade County and the ninth Hispanic district is in Collier County. The four districts containing an African-American majority VAP are contained in Dade County. In the nine Hispanic supermajority VAP districts, Hispanics constitute the following percentages of the VAP: (1) District 102 -- 65.68 percent; (2) District 107 -- 63.85 percent; (3) District 110 is 83.64 percent; (4) District 111 76.56 percent; (5) District 112 -- 68.67 percent; (6) District 113 --75.70 percent; (7) District 114 -- 78.38 percent; (8) District 115 --65.28 percent; and (9) District 117 -- 69.18 percent. African-Americans constitute the

following percentages of the VAP in the four African-American districts: (1) District 103 -- 55.73 percent; (2) District 104 -- 50.96 percent; (3) District 108 -- 57.24 percent; and (4) District 109 55.21 percent. Florida's House reapportionment plan creates twenty Dade County districts of which seventeen are wholly within Dade County and two share populations with other counties. District 102 joins population in Dade County with Collier County, and District 120 joins population in southern Dade County with Monroe County.

The De Grandy/Reaves/Humphrey plaintiffs and the DOJ take exception to Florida's House reapportionment plan as it pertains to Dade County because Florida's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority in only nine House districts. The plaintiffs contend that if the Dade County area of the State is divided into equally populated House districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a supermajority of the VAP in two additional House districts.

For reasons already discussed in connection with the Senate, we hold that VAP is the relevant number for creating minoritymajority House districts and that a supermajority of the VAP is necessary to create districts in which Hispanics can elect candidates of their choice. See supra section III, A. Additionally, we note that a supermajority VAP of 60 percent is an appropriate guideline for determining if two additional Hispanic districts can be created in the Dade County area. See supra Section III, A. In this case, the DOJ and the De Grandy/Reaves/Humphrey plaintiffs have established that eleven geographically compact districts can be drawn in which Hispanics in Dade

County would have the potential to elect candidates of their choice.

The De Grandy/Reaves/Humphrey plaintiffs submitted the De Grandy plan which creates eleven Hispanic supermajority VAP districts. Hispanics constitute the following percentages of the VAP in the De Grandy plan's eleven Hispanic districts: (1) District 105 --71 percent; (2) District 108 -- 78.2 percent; (3) District 109 -- 64.6 percent; (4) District 110 -- 66.2 percent; (5) District 111 -- 65.8 percent; (6) District 112 -- 64.5 percent; (7) District 113 -- 66.6 percent; (8) District 114 -- 65.8 percent; (9) District 115 -- 68.2 percent; (10) District 116 -- 65.8; and (11) District 117 65.6 percent. This plan remedies the dilution of the Hispanic vote and does not adversely affect African-Americans because it creates four African-American districts. In the four African-American districts, African-Americans constitute the following percentages of the VAP: (1) District 102 -- 57.6 percent; (2) District 103 -- 57.8 percent; (3) District 106 -- 57.7 percent and (4) District 107 -- 57.3 percent.

Pursuant to Upham v. Seamon and White v. Weiser, this court sought to limit its intrusion upon state policy to what was necessary to correct the Section 2 violation. Accordingly, we allowed the State of Florida to present another House plan which remedied the dilution of the Hispanic vote and preserved its policy choices. The Florida House defendants initially presented a remedy containing only ten Hispanic districts which this court rejected as not fully remedying the dilution of the Hispanic vote. After warning the court to be very careful and deliberate in considering any changes to the Florida House plan, the Florida House defendants presented another remedial plan. Tr. VIII-126.

The Florida House defendants' second remedial plan contained eleven Hispanic supermajority VAP districts and four AfricanAmerican VAP districts. In the House defendants' second remedial plan, the changes were confined to Dade County. Tr. VIII-126. The eleven Hispanic districts in the Florida House defendants' second remedial plan contain the following Hispanic VAP percentages: (1) District 102 -- 5.78 percent; (2) District 106 -- 61.34 percent; (3) District 107 -- 61.05 percent; (4) District 110 -- 77.66 percent; (5) District 111 -- 77.39 percent; (6) District 112 -- 62.77 percent; (7) District 113 -- 62.22 percent; (8) District 114 -- 65.23 percent; (9) District 115 -- 65.29 percent; (10) District 16 -- 65.60; and (11) District 117 at 63.81 percent. With respect to African-Americans, the second remedial plan created four African-American districts containing the following AfricanAmerican VAP percentages: (1) District 103 -- 61.51 percent; (2) District 104 -- 55.10 percent; (3) District 108 -- 55.25 percent; and (4) District 109 -- 64.60 percent.

Because the Florida House defendants arbitrarily confined its changes to Dade County, the House defendants' second remedial plan does not create eleven effective House districts which give Hispanics the potential to elect the candidates of their choice. The second remedial House plan creates two House districts in the Miami beach area which as we noted earlier has high concentrations of recent arrivals and non-citizens. Tr. VIII-129-130. Additionally, these two districts, District 106 and District 107, have Hispanic VAP of 61 percent. Tr. VIII-130. We noted in our discussion of Florida's Senate plan that areas with high concentrations of recent Hispanic arrivals must have a VAP significantly higher than our 60 percent guideline level. See supra Section III, A. Because these two 61 percent

districts are located in areas with high concentrations of recent Hispanic arrivals, we find that these districts do not give Hispanics a reasonable opportunity to elect candidates of their choice. Hence, we reject the Florida House defendants' second remedial plan because it fails to remedy the dilution of the Hispanic vote in South Florida.

The De Grandy/Reaves/Humphrey plaintiffs presented the modified De Grandy plan which sought to respect the policy choices of the state of Florida by merging the De Grandy remedy for South Florida into the existing Florida plan. The eleven Hispanic South Florida districts in the modified De Grandy plan contain the following Hispanic VAP percentages: (1) District 105 -- 1.62 percent; (2) District 108 -- 81.89 percent; (3) District 109 -- 63.74 percent; (4) District 110 -- 62.56 percent; (5) District 111 66.19 percent; (6) District 112 -- 65.10 percent; (7) District 113 -- 66.06 percent; (8) District 114 -- 66.39 percent; (9) District 115 -- 68.52 percent; (10) District 116 -- 65.83 percent; and (11) District 117 -- 66.24 percent. With respect to AfricanAmericans in South Florida, the modified De Grandy plan creates four African-American districts containing the following African-American VAP percentages: (1) District 102 -- 55.12 percent; (2) District 103 -- 59.54 percent; (3) District 106 -- 57.93 percent; and (4) District 107 -- 56.46 percent. The modified De Grandy plan also creates a strong African-American access district in South Florida with an African-American VAP of 40.34 percent.

The modified De Grandy plan of course contained minor adjustments to district lines outside of Dade County in order to comply with the rule of "one person, one vote." Plaintiff De Grandy testified that:

> What we tried to do in the De Grandy Modified was to as much as possible enhance a little more the -- a couple of the African-American seats while at the same time not impacting and trying to fit in the plan not impacting any other county than that which was impacted by Dade. That includes Dade; Monroe, which had a district in the Florida plan coming into Dade; Collier, which had a district in the Florida plan coming into Dade and Broward County.
>
> When you fit the plan, you have to not only fit the configuration, but also in terms of half the population of each district you have to deviate to comport with the plan you are fitting into. And while doing that, we also, when we were deviating that population tried to in effect, you know, boost our seats or minority seats more than they are in the De Grandy plan.
>
> So, basically, Your Honor, what we are really arguing is, Your Honors, please accept the De Grandy plan and accept it in the manner we have inserted it. That's what we are really arguing.

Tr. VIII-106-107. The plaintiffs are correct that in adopting a South Florida remedy adjustments must be made between what is in the Florida plan north of Dade and what the court adopts. The total enfranchisement of the minority populations in Dade County through creating a fair plan, causes a "ripple effect" into other counties leaving the problem of how to adjust the affected districts. The

modified De Grandy plan minimized this "ripple effect" to eleven districts outside of Dade County. We find that the modified De Grandy plan best remedies the dilution of the Hispanic vote in South Florida while advancing the interests of African-Americans in South Florida. Accordingly, this court adopted the modified De Grandy plan as the court's plan and imposed that plan.

IV. CONCLUSION

This court issued orders following the completion of this case which carried out the conclusions expressed in this opinion. (Doc. 553 and 554). We held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights of 1965, as amended. (Doc. 553.) This language should read as holding that the Florida Senate plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate plan violates Section 2 of the voting rights act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and South Florida area. With respect to Florida's House of Representatives Districts we adopted the Modified De Grandy House of Representative Plan, Plan 268, as the court's plan and also impose that plan.

JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

ROGER VINSON
UNITED STATES DISTRICT JUDGE

Vinson, J. Concurring.

I join in the opinion, but set out separately my rationale for the result.

(1) Section 2 claims under the Voting Rights Act must meet the three-part test of Thornburg v. Gingles, 478 U.S. 30, 50-51, 106 S.Ct. 2752, 92 L.Ed.2d 25, 46-47 (1986): (a) a minority population that "is sufficiently large and geographically compact to constitute a majority" in a district; (b) a "politically cohesive" minority group; and (c) a white majority that "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

(2) For Dade County, the second and third parts of the test are established by the overwhelming weight of the evidence in this case, subject to some variations among Hispanics from different counties of origin, and subject to the distinction that the Hispanic minorities are generally diametrically opposed to the voting preferences of the African-American minorities.

(3) Thus, the issue in both the challenge to the Florida Plan for the state senate districts and for the state House districts in Dade County is a very narrow one: Have the plaintiffs established that the minority populations are sufficiently large and geographically compact to constitute a voting age majority in a district?

(4) Regarding the Senate challenge, the Hispanic plaintiffs established that they could have a fourth Hispanic-majority district that would be geographically compact, but only by either diluting the voting strength of African-American majority districts or by Preserving such strength

ln districts that are not geographically compact. The African-American plaintiffs established that they could create a third African-American majority district only by using a district that was not geographically compact and which would also greatly dilute the voting strength of Hispanics. Moreover, it is impossible to accommodate both four Hispanic and three African-American majority districts in any acceptable manner. Therefore, while the plaintiffs have established a Section 2 violation as to the four Hispanic districts, any remedy implementing the fourth district would violate Section 2 as to African-American. Thus, the existing Florida Plan for the Senate districts best accommodates the competing interests of both Hispanics and African-Americans.

(5) Regarding the House challenge, the plaintiffs have established in the De Grandy plan that eleven districts can be established in which Hispanics constitute over 64% of the voting age population and which are geographically compact. Further, these districts can be drawn without any dilution of African-American voting strength. Therefore, plaintiffs have established all requisites of their Section 2 claim as to the Dade County districts for the House of Representatives.

(5) (a) The defendants have attempted to show that it is the citizen Hispanic voting age population that is determinative. That Hispanic citizenship data is not available, however. Despite the lack of available data, the defendants presented estimates of Hispanic citizenship and attempted to apply them to the individual districts. Those estimates are unreliable. For example, William De Grove's analysis was based on a somewhat unorthodox regression analysis methodology that gave a range of non-citizenship rates of 9.5% for precincts with no Hispanics to

55% for precincts with 100% Hispanic voters. (Acknowledging, of course, that there is no such precinct.) He recognized that the error in that analysis was greatest at the extremes, i.e. at the 9.5%.and 55% intercepts. Nevertheless, he used the 55% as the basis of all his citizenship calculations. Plainly, his estimated Hispanic citizenship ratios for the eleven districts must be viewed with low confidence and with a large range of error.

(5) (b) A better gauge of eligible voters within a district is the analysis of last election results. Those statistics established that Hispanics would be able to elect Hispanic candidates of choice in all eleven districts proposed by plaintiffs, and those statistics automatically account for voter citizenship, registration, and turn out. Thus, in the absence of any better data, the plaintiffs' evidence is sufficient. Further, Dr. Allan Lichtman's calculations for the plaintiffs, based in part on the defendants' citizenship data estimates, reflected in Hispanic voting age citizenship of or more in all of the questioned eleven districts. This is a more relevant calculation, for the supermajority percentages are merely designed to account for, inter alia, citizenship.

(5)(c) Equally important, it is unrefuted that Hispanics have been able to elect the Hispanic candidate of choice in every district in which Hispanics constitute 59% or more or the voting age population (without regard to citizenship). It is not necessary to target anything greater than that. Nor is it necessary, although it may be desirable, to create a supermajority of 65% Hispanics (or 55% African-Americans) to accomplish Section 2's purposes. Additionally, the growth trends in Dade county's Hispanic population indicate that the percentage of Hispanics will continue to increase, but the plaintiffs' section 2 claim* have been

evaluated only on the basis of the 1990 census data. That data clearly establishes that the eleven districts meet the Gingles test.

(6) The remedial aspect of this court's adoption of the modified De Grandy plan presented a major challenge. In recognition of the respect due to the state's own policy and plan for redistricting, this court considered the defendants' two submitted plans, neither of which was even close to meeting Section 2's requirements and incorporating eleven Hispanic districts in Dade County in accordance with this court's findings on liability. At plaintiffs' suggestion, this court then requested that the defendant draw a plan that incorporated the De Grandy plan for Dade county into the rest of the state. The defendants refused, however, and the court recessed to consider all of the alternatives available and make a decision. Because of the severe time constraints and the upcoming July 4th holiday weekend, it was critical that a plan be adopted without further delay. It was also apparent that the defendants were intent on delaying the adoption of any plan that implemented a true eleven-Hispanic districts House plan for Dade County. Accordingly, this court adopted the modified De Grandy plan. It does, of course, have a "ripple effect," but that effect ia relatively minor and simply cannot be avoided. The defendants' belated change of position and announcement that they would attempt to draw a plan incorporating the eleven Hispanic districts from the De Grandy plan into the rest of the state came too late.

Amendment I.

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States

or by any State on account of race, color, or previous condition of servitude.

---

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub.L. 97-205, § 3, June 29, 1982, 96 Stat. 134).

---

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgment of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States

District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of

section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO.: 92-40015WS

MIGUEL De GRANDY, et al.,

Plaintiffs,

v.

T.K.WETHERELL, in his official capacity, et al.,

Defendants/Third Party Plaintiffs,

v.

WILLIAM P. BARR, as Attorney General of the United States of America,

Third Party Defendant.

_____/

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, et al.,

CASE NO.: 92-40131

Intervenor/ Plaintiffs,

v.

LAWTON CHILES, et al.,

Defendants.

_____/

PLAINTIFFS' NOTICE OF APPEAL

Pursuant to Supreme Court Rule 18 and 28 U.S.C. § 1253, Plaintiffs, Miguel DeGrandy, et al., hereby appeal to the United States Supreme Court from the Judgment of the three-judge District Court entered in this action on July 2, 1992, embodied in document number 553. Specifically, Plaintiffs appeal from that portion fo the judgment in document 553 which adjudges that Florida's state Senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 or Section 5 of the Voting Rights Act. Plaintiffs also appeal from the Court's order directing that 1992 and all future elections be conducted in accordance with the 1992 Florida Senate Plan.

Respectfully submitted,

_____

GEORGE N. MEROS, JR., ESQ.
Florida Bar No.: 0263321
RUMBERGER, KIRK & CALDWELL
Post Office Box 10507
Tallahassee, Florida 32302
(904) 222-6550

and

E. THOM RUMBERGER, ESQUIRE
Florida Bar No.: 0069480
DANIEL J. GERBER, ESQUIRE
Florida Bar No.: 0764957
RUMBERGER, KIRK & CALDWELL
A Professional Association
11 East Pine Street
Post Office Box 1873
Orlando, Florida 32802
(407) 425-1802

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been duly furnished by U.S. Mail/Hand/Facsimile delivery to: All Counsel on the attached Consolidated Service List, this 31st day of July, 1992.

GEORGE N. MEROS, JR., ESQ.
Florida Bar No.: 0263321
RUMBERGER, KIRK & CALDWELL
Post Office Box 10507
Tallahassee, Florida 32302
(904) 222-6550

and

E. THOM RUMBERGER, ESQUIRE
Florida Bar No.: 0069480
DANIEL J. GERBER, ESQUIRE
Florida Bar No.: 0764957
RUMBERGER, KIRK & CALDWELL
A Professional Association
11 East Pine Street
Post Office Box 1873
Orlando, Florida 32802
(407) 425-1802

ATTORNEYS FOR PLAINTIFFS

Steve Zack, Esquire
Zack, Hanzman, Ponce & Tucker, P.A.
c/o The Senate Committee on Reapportionment
Suite 726, The Capitol
Tallahassee, FL 32399-1100

Kevin X. Crowley, Esquire
Cobb, Cole & Bell
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301

George L. Waas, Esquire
Assistant Attorney General
The Capitol, Suite 1501
Tallahassee, FL 32399-1050

Charles G. Burr, Esquire
442 W. Kennedy Boulevard, Suite 300
Tampa, FL 33606

Harry L. Lamb, Jr., Esquire
Perry & Lamb, P.A.
605 East Robinson Street
Orlando, FL 32801

Dennis Courtland Hayes, Esquire
Willie Abrams, Esquire
NAACP Special Contribution Fund
4805 Mount Hope Drive
Baltimore, MD 21215-3297

Henry Hunter, Esquire
219 E. Virginia Street
Tallahassee, FL 32301

Brenda Wright, Esquire
Lawyer's Committee for Civil Rights
Under Law
1400 Eye Street, N.W., Suite 400
Washington, DC 20005
and
Larry White, Esquire
1020 East Lafayette Street, Suite 104
Tallahassee, FL 32301

Mark Levine, Esquire
245 East Virginia Street
Tallahassee, FL 32301

Parker D. Thomson, Esquire and
Carol A. Licko, Attorney at Law
1700 AmeriFirst Building
One Southeast Third Avenue
Miami, FL 33131

Edwin J. Turanchik, Esquire
Zinober & McCrea
201 East Kennedy Blvd.
Suite 1750
Tampa, FL 33602

Rodney G. Gregory, Esquire
100 Riverside Avenue
Jacksonville, FL 32202

J. Gerald Hebert, Esquire
Steven J. Mulroy, Esquire
U.S. Attorney's Office
Northern District of Florida
315 S. Calhoun St.
Suite 510
Tallahassee, FL 32301-1841

Aurora Ares, Esquire
Thornton, David, Murray, Richard & Davis
2950 S.W. 27th Avenue, Suite 100
Miami, FL 33131

Craig T. James, Esquire
245 East Shady Branch Trail
DeLand, FL 32724

Samuel Dubbin, Esquire
Steel, Hector & Davis
4000 S.E. Financial Center
Miami, FL 33131

Alicia Morales, Esquire
Ferrell, Cardenas, Pertel & Morales
Miami Center, Suite 1920
201 S. Biscayne Blvd.
Miami, FL 33131-2305

F. Perry Odom, Esquire
Ervin, Varn, Jacobs, Odeom & Ervin
305 S. Gadsden Street
Tallahassee, FL 32302

Douglas Moody, Jr., Esquire
225 S. Adams Street
Tallahassee, FL 32301

Mark Herron, Esquire
Akerman, Senterfitt, Eidson & Moffitt
216 S. Monroe Street, Suite 300
Tallahassee, FL 32301

Sidney L. Matthew, Esquire
Gorman & Matthew
135 S. Monroe Street, Suite 100
Tallahassee, FL 32301

E. Bryan Wilson, III, Esquire
Assistant U.S. Attorney
315 S. Calhoun Street
Suite 510
Tallahassee, FL 32301

SECTION 16. Legislative apportionment.--

(a) SENATORIAL AND REPRESENTATIVE DISTRICTS. The legislature at its regular session in the second year following each decennial census, by joint resolution, shall apportion the state in accordance with the constitution of the state and of the United States into not less than thirty nor more than forty consecutively numbered senatorial districts of either contiguous, overlapping or identical territory, and into not less than eighty nor more than one hundred twenty consecutively numbered representative districts of either contiguous, overlapping or identical territory. Should that session adjourn without adopting such joint resolution, the governor by proclamation shall reconvene the legislature within thirty days in special apportionment session which shall not exceed thirty consecutive days, during which no other business shall be transacted, and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment.

(b) FAILURE OF LEGISLATURE TO APPORTION; JUDICIAL REAPPORTIONMENT. In the event a special apportionment session of the legislature finally adjourns without adopting a joint resolution of apportionment, the attorney general shall, within five days, petition the supreme court of the state to make such apportionment. No later than the sixtieth day after the filing of such position, the supreme court shall file with the secretary of state an order making such apportionment.

(c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state

for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

(d) EFFECT OF JUDGMENT IN APPORTIONMENT: EXTRAORDINARY APPORTIONMENT SESSION. A judgment of the supreme court of the state determining the apportionment to be valid shall be binding upon all the citizens of the state. Should the supreme court determine that the apportionment made by the legislature is invalid, the governor by proclamation shall reconvene the legislature within five days thereafter in extraordinary apportionment session which shall not exceed fifteen days, during which the legislature shall adopt a joint resolution of apportionment conforming to the judgment of the supreme court.

(e) EXTRAORDINARY APPORTIONMENT SESSION; REVIEW OF APPORTIONMENT. Within fifteen days after the adjournment of an extraordinary apportionment session, the attorney general shall file a petition in the supreme court of the state setting forth the apportionment resolution adopted by the legislature, or if none has been adopted reporting that fact to the court. Consideration of the validity of a joint resolution of apportionment shall be had as provided for in cases of such joint resolution adopted at a regular or special apportionment session.

(f) JUDICIAL REAPPORTIONMENT. Should an extraordinary apportionment session fail to adopt a resolution of apportionment or should the supreme court

determine that the apportionment made is invalid, the court shall, not later than sixty days after receiving the petition of the attorney general, file with the secretary of state an order making such apportionment.

THE FLORIDA LEGISLATURE

OFFICE OF THE PRESIDENT **OFFICE OF THE SPEAKER**

June 18, 1992

Re: Case 79,674
Legislative Apportionment

To the Honorable Justices of the Florida Supreme Court:

We have received your Order dated Wednesday, June 17, 1992, and thank you for your invitation to the Florida Legislature to again consider a legislative apportionment plan in light of the objections of the United States Department of Justice.

We do hereby officially transmit to you our joint determination that we will not convene our respective houses in special session, or expand the scope of the current special session, to include legislative apportionment issues.

Accordingly, we urge the Court to invoke its authority to accomplish the specific adjustments relating to Section V issues relative to Hillsborough County raised by the United States Department of Justice.

Respectfully,

Gwen Margolis
President

T.K. Wetherell
Speaker

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO.: 92-40015WS

MIGUEL DE GRANDY, et al.,

Plaintiffs,

vs.

T.K. WETHERELL, in his official capacity, et al.

Defendant/Third Party Plaintiffs,

vs.

WILLIAM P. BARR, as Attorney General of the United States of America,

Third Party Defendant.

_____/

FLORIDA STATE CONFERENCE CASE NO.: 92-40131
OF NAACP BRANCHES, et al.

Intervenor/ Plaintiffs,

vs.

LAWTON CHILES, et al.

Defendants.

_____/

AFFIDAVIT

I, Rockie Pennington, the undersigned being first duly sworn upon oath, do hereby depose and state as follows:

1. I am currently a consultant to the Republican Senate Committee and have been assigned to assist members of the 19 member Republic minority in the Senate with the task of reapportionment. During the reapportionment process I have become familiar with the demographics of the South Florida area and have drawn numerous plans for this area.

2. During the past week, at the request of State Senator Curt Kiser and others, I have become involved in the process of drafting alternative plans for the South Florida area. In that regard I have examined and am familiar with the DeGrandy plan for the Senate, known as Senate Plan 275 and the Reeves-Brown plan for the Senate, known as Senate Plan 180. I am also familiar with the Senate Joint Resolution. 2-G as modified.

3. I was instructed to draft alternative districts for the Date County and South Florida area so under two different instructions:

First draw four hispanic districts and three black districts in which these minorities can nominate and elect a candidate of their choice. I interpreted these instructions as requiring a hispanic controlled district as a district in which hispanics comprise at least 60% or greater of the voting age population of the district, and as requiring a black controlled district as comprises at least 51% or greater of the voting age population of the district. I also understood this instruction as to keep the population deviation of the districts uniform with SJR-2G's limitations of .04%.

4. Using these instructions I was able to draft three alternative plans which achieve these results. The first plan I have designated as Plan 345. Plan 345 has four hispanic districts with the following voting age populations, 65.3%; 64%; 60% and 69.2% and three black districts with the following voting age populations, 52.5%, 55.3% and 52.3%.

5. I am currently working on Fairplan D which will in my opinion produce similar results. Fairplan D will crate similar black districts in Dade County as those that are produced in the Reeves-Brown plan with black VAP of 47.1, 59.6 and 61.2 and modify the surrounding districts to accommodate these changes. Fairplan D also creates 4 Hispanic districts with VAPs of 65.5%, 63.2%, 60% and 69.5%.

6. I have also produced a more limited plan for minority representation in the Senate which has four hispanic majority districts, two black majority districts and one black access district. This plan is known as Plan 346 and creates four hispanic districts with a voting age population of 65.3%, 64%, 60%, and 69.2% and three

black districts with a voting age population of 51.7%, 52.3%, and 48.5%.

7. I have also studied the so-called "ripple effect" of creating such plans. I have attempted to contain the ripple effect to as few counties as possible so as not to alter the boundary line decisions contained in SJR-2G as modified by the Supreme Court and still obtain the results desired. In Plan 345 there are changes in Senate Districts 25,28,33,35, and 29 in addition to the districts in Dade County. In PlanFair C there are changes in Senate Districts 15,24,25,27,28,29,30,31,33 and 35 in addition to those made in Dade County. I have not completed the drafting of Fairplan D but I anticipate that the changes in districts will be similar to or greater than those in Plan 345.

8. in comparing the ripple effect of the changes to the districts in Dade County with those the Supreme Court made in Hillsborough County, there are 9 Senate Districts altered in making the changes in Hillsborough County.

9. I am prepared to testify at the remedial phase of the trial and to introduce these plans at that time. Statistics and Maps for Plan 345 are attached as Exhibit "A" and "B".*

---

* The map and written description of the Florida Senate Plan, attached to the Affidavit is omitted from the Appendix; a copy of the Plan is lodged with the Clerk of the Court. (Appellants' footnote; not appearing in Affidavit.)

10. I believe given proper and specific instructions from the court I could produce a plan tailored to accommodate the courts directives along the lines outlined above within 24 to 48 hours of receiving the directives of the court. I would be willing to assist the court in drafting any alternative plans it desires.

FURTHER, AFFIANT SAITH NOT.

_____
Rockie Pennington

STATE OF FLORIDA
COUNTY OF LEON

The foregoing instrument was acknowledged before me this 1st day of July, 1992, by ROCKIE PENNINGTON who is personally known to me (~~or who has produced~~ _____ as identification and who did (~~did not~~) take an oath.

Tina S. Mauldin
Signature
Tina S. Mauldin
MY COMMISSION #OC 20603 EXPIRES
June 24, 1998

_____
_____
Serial number, if any

Respectfully submitted,

_____
GEORGE N. MEROS, JR., ESQ.
Florida Bar No.: 0263321
RUMBERGER, KIRK & CALDWELL
Post Office Box 10507
Tallahassee, Florida 32302
(904) 222-6550

and

E. THOM RUMBERGER, ESQUIRE
Florida Bar No.: 0069480
DANIEL J. GERBER, ESQUIRE
Florida Bar No.: 0764957
RUMBERGER, KIRK & CALDWELL
A Professional Association

11 East Pine Street
Post Office Box 1873
Orlando, Florida 32802
(407) 425-1802

ATTORNEYS FOR PLAINTIFFS

FILING AND MAILING CERTIFICATE

I hereby certify that on this 29th day of September, 1992, I filed 40 copies of a Jurisdictional Statement with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required (1) copies to:

Steve Zack, Esquire
ZACK, HANZMAN, PONCE & TUCKER, P.A.
c/o The Senate Committee on Reapportionment
Suite 726, The Capitol
Tallahassee, Fl 32399-1100

Kevin X. Crowley, Esquire
COBB, COLE & BELL
315 S. Calhoun Street, Suite 500
Tallahassee, FL 32301

George L. Waas, Esquire
Assistant Attorney General
The Capitol, Suite 1501
Tallahassee, FL 32399-1050

Charles G. Burr, Esquire
442 W. Kennedy Boulevard, Suite 300
Tampa, FL 33606

Harry L. Lamb, Jr., Esquire
PERRY & LAMB, P.A.
605 East Robinson Street
Orlando, FL 32801

Dennis Courtland Hayes, Esquire
Willie Abrams, Esquire
NAACP Special Contribution Fund
4805 Mount Hope Drive
Baltimore, MD 21215-3297

Henry Hunter, Esquire
219 East Virginia Street
Tallahassee, FL 32301

Brenda Wright, Esquire
Lawyer's Committee for Civil Rights
Under Law
1400 Eye Street, N.W., Suite 400
Washington, DC 20005

Larry White, Esquire
1020 East Lafayette Street, Suite 104
Tallahassee, FL 32301

Mark Levine, Esquire
245 East Virginia Street
Tallahassee, FL 32301

Parker D. Thomson, Esquire
Carol A. Licko, Attorney at law
1700 AmeriFirst Building
One Southeast Third Avenue
Miami, FL 33131

Edwin J. Turanchik, Esquire
ZINOBER & McCREA
201 East Kennedy Blvd.
Suite 1750
Tampa, FL 33602

Rodney G. Gregory, Esquire
100 Riverside Avenue
Jacksonville, FL 32202

J. Gerald Hebert, Esquire
Steven J. Mulroy, Esquire
Voting Rights Section
Department of Justice
Washington, DC 20530

Aurora Ares, Esquire
THORNTON, DAVID, MURRAY, RICHARD
& DAVIS
2950 S.W. 27th Avenue, Suite 100
Miami, FL 33131

Craig T. James, Esquire
245 East Shady Branch Trial
DeLand, FL 32724

Samuel Dubbin, Esquire
STEEL, HECTOR & DAVIS
4000 S.E. Financial Center
Miami, FL 33131

Alicia Morales, Esquire
FERRELL, CARDENAS, PERTEL & MORALES
Miami Center, Suite 1920
201 S. Biscayne Blvd.
Miami, FL 33131-2305

F. Perry Odom, Esquire
ERVIN, VARN, JACOBS, ODEOM & ERVIN
305 S. Gadsden Street
Tallahassee, FL 32302

Douglas Moody, Jr., Esquire
225 S. Adams Street
Tallahassee, FL 32301

Mark Herron, Esquire
AKERMAN, SENTERFITT, EIDSON
& MOFFITT
216 S. Monroe Street, Suite 300
Tallahassee, FL 32301

Sidney L. Matthew, Esquire
GORMAN & MATTHEW
135 S. Monroe Street, Suite 100
Tallahassee, FL 32301

E. Byran Wilson, III, Esquire
Assistant U.S. Attorney
315 S. Calhoun Street
Suite 510
Tallahassee, FL 32301

Solicitor General
Department of Justice
Washington, DC 20530

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

Barbara Drone
Lawyers Printing Company
Suite B-115
7th & Franklin Building
Richmond, Virginia 23219

Supreme Court, U.S.
FILED
DEC
AUG 29 1992
OFFICE OF THE CLERK

Nos. 92-593, 92-767

In the
Supreme Court of the United States
October Term, 1992

MIGUEL DE GRANDY, *et al.*,
Appellants

v.

T. K. WETHERELL, *et al.*,
Appellees

UNITED STATES OF AMERICA,
Appellant

v.

STATE OF FLORIDA, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

JOEL I. KLEIN
PAUL M. SMITH
Klein, Farr, Smith & Taranto
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

STEPHEN N. ZACK
(Counsel of Record)
NORMAN C. POWELL
Zack, Hanzman, Ponce & Tucker, P.A.
3300 International Place
100 S.E. Second Street
Miami, Florida 33131
(305) 539-8400

QUESTIONS PRESENTED

1. Whether the express terms of the judgment on appeal, finding no liability on the part of the appellees, bar appellants from presenting issues solely relating to the appropriate remedy for a violation that was announced only in the court's post-judgment opinion.

2. Whether a state-enacted reapportionment plan that provides minority plaintiffs with better than an equal opportunity to elect representatives of their choice can be found to violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

3. Whether a state-enacted reapportionment plan that is found to result in the "fairest balance" of "the competing interests of Hispanics and African-Americans" can simultaneously be held to violate Section 2 of the Voting Rights Act.

TABLE OF CONTENTS

STATEMENT 1

REASONS TO DISMISS OR AFFIRM 10

The appeals should be dismissed because the judgment does not raise the questions presented by Appellants. 12

The undisputed facts demonstrate that Hispanic voters in Dade County have more than an equal opportunity to elect representatives of their choice . 15

The district court's factual finding that the Florida Senate Plan most fairly balances the competing interests of African-American and Hispanic voters also demonstrates that the Plan does not violate the Voting Rights Act. 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases:

Aoude v. Mobil Oil Corp., 862 F.2d 890 (1st Cir. 1988) 13

Birdsong v. Wrotenbery, 901 F.2d 1270 (5th Cir. 1990) 13

Bowles v. United States, 319 U.S. 33 (1943) 19

Black v. Cutter Lab., 351 U.S. 292 (1956) 12

California v. Rooney, 483 U.S. 307 (1987) 12

Eakin v. Continental Illinois Nat. Bank & Tr. Co., 875 F.2d 114 (7th Cir. 1989) 14

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 597 So.2d 276 (Fla. 1992) 5-6

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So.2d 543 (Fla. 1992) 5

Krull v. Celotex Corp., 827 F.2d 80 (7th Cir. 1987) . . . 13

McDaniel v. Sanchez, 452 U.S. 130 (1981) 13

Massachusetts v. Wescott, 431 U.S. 323 (1977) 19

Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992) 16, 23

Quilter v. Voinovich, 794 F. Supp. 695, 701 (N. D. Ohio 1992) 28

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) 18

Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718, 727 (3rd Cir. 1988) 14

Syntex Pharmaceuticals v. K-Line Pharmaceuticals, 905 F.2d 1525 (Fed. Cir. 1990) 14

Thornburg v. Gingles, 478 U.S. 30 (1986) 7-8, 9, 15-16, 20-21, 24

Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991) *sum. aff'd*, 112 S. Ct. 2296 (1992) . . . 17, 20

Voinovich v. Quilter, No. 91-1618 . . . . . 11, 26, 28-29

Statutes:

28 U.S.C. 2284 6

Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:

§ 2, 42 U.S.C. 1973 . 1-2, 9, 11, 15, 17, 21-22, 24, 25-26

§ 5, 42 U.S.C. 1973c 5, 13

Miscellaneous:

6A *Moore's Federal Practice* (2d ed. 1992) 12-13

Fed. R. Civ. P. Rule 52(a) 24

Fed. R. Civ. P. Rule 58 12-13

Fed. R. Civ. P. Rule 59(e) 12-13

Fed. R. Civ. P. Rule 60(a) 12

Fed. R. Evid. Rule 201 19
Florida Constitution, Art. III, § 16(a) 2
Florida Constitution, Art. III, § 16(c) 5
Florida Senate Joint Resolution 2-G 4, 5
Sup. Ct. R. 24.1(a) 14

In the
Supreme Court of the United States
October Term, 1992

No. 92-593

MIGUEL DE GRANDY, *et al.*,
Appellants

v.

T. K. WETHERELL, *et al.*,
Appellees

No. 92-767

UNITED STATES OF AMERICA,
Appellant

v.

STATE OF FLORIDA, *et al.*,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

STATEMENT

The case involves a challenge to the reapportionment plan adopted by the State of Florida after the 1990 federal decennial census. Appellants, a group of Hispanic plaintiffs, referred to as the "De Grandy" appellants, and the United States, which generally supports the De Grandy effort, prevailed in their challenge under Section 2 of the Voting

Rights Act, 42 U.S.C. § 1973, against the Florida Plan for the State House of Representatives, but not against the Plan for the State Senate. The House officials have filed a jurisdictional statement in No. 92-519, *Wetherell v. De Grandy*. The De Grandy appellants and the United States have filed separate jurisdictional statements in No. 92-593, *De Grandy v. Wetherell,* and No. 92-767, *United States v. Florida,* challenging the decision as to the Senate Plan. This response demonstrates that the De Grandy and United States appeals should be dismissed or, in the alternative, that the district court's judgment finding no liability as to the Senate Plan should be summarily affirmed.

1. *The Reapportionment Process.* Pursuant to the Florida Constitution, Art. III, § 16(a), the state legislature is required to develop a reapportionment plan, based on the decennial federal census data, to govern House and Senate elections. In anticipation of the 1990 census, and cognizant of the large population changes in Florida during the 1980's, the legislature began preparing for this assignment in 1987. The House and the Senate hired expert technical staff and provided them with state-of-the-art computer systems. Both chambers appointed Committees on Reapportionment to aid in developing legislative plans, and both committees included African-American and Hispanic members in key decision-making positions. Testimony of Representative Miguel De Grandy, Tr. IV, 42-45; Testimony of Representative Willie Logan, Tr. VII, 73-77; Testimony of Leon Russell, Vice President of the State Conference of the NAACP, Tr. III, 107-108. The House and Senate also co-hosted 32 public hearings throughout the State and two statewide teleconferences. The purpose of the hearings and teleconferences was to ensure increased public awareness on reapportionment and to provide the legislature with public input prior to the adoption of any reapportionment plan.

According to 1990 census data, Florida's total population increased from 9,746,324 in 1980 to 12,937,926 in 1990. Bureau of the Census, Dep't of Commerce, Pub. PC80-1-B11, 1980 Census of Population (Florida) 26 (Aug. 1982); Bureau of the Census, Dep't of Commerce, Pub. CN:11271491053, 1990 Census of Population and Housing (Florida) 1 (Jan. 1991). Florida's population is primarily composed of three major ethnic and racial groups: non-Hispanic whites (or whites), African-Americans (or blacks), and Hispanics. There are 9,475,326 whites, which amounts to 73 percent of the State's total population; 1,701,103 African-Americans (13%); 1,574,143 Hispanics (12%), and 187,354 others (1%). *Id.*

Dade County, which is the part of the reapportionment plan that is challenged by both appellants here, is Florida's most populous county. During the 1980's Dade's total population increased by 19 percent, from 1,625,781 to 1,937,094. 1980 Census at 34; 1990 Census at 59. But the County's growth did not keep pace with the State as a whole. As a result, in the 1992 reapportionment, Dade lost a Senate seat and is, on a pro rata statewide basis, now entitled to only 6 such seats.[1] *See* Testimony of Miguel De Grandy, Tr. II, 155-156.

Hispanics make up 49 percent of Dade County's total population and 50 percent of its voting age population (VAP); whites make up 30 percent of the County's total population and 32 percent of the VAP; and African-Americans make up 19 percent of the total population and 16 percent of the VAP. U.S. Ex. 7, pp. 24-25, 61. The number of Hispanics living in Dade County increased by 372,413 people or 64 percent in the period from 1980 to 1990. *See* 1980 Census at 34; 1990 Census at 59. This substantial gain was primarily the result of

---

[1] Dade County's population is 1,937,094. The ideal Senate District is 323,448, based on a statewide population of 12,937,926 divided into forty equal-sized districts. Dade is thus numerically entitled to 5.99 Senate districts.

immigration from Latin American countries. Testimony of Dr. Dario Moreno, Tr. II, 14, 18-19; *see also* U.S. Ex. 37, pp. 5-6.[2] As a result, approximately one-third of the County's VAP is non-citizen. Testimony of William De Grove, Tr. VII, 17-18.

2. *The Reapportionment Plan.* On April 10, 1992, the Florida Legislature, relying on the information obtained from the 1990 census and from its public hearings, adopted Senate Joint Resolution 2-G ("SJR 2-G" or the "Plan") reapportioning the State's forty Senatorial districts. SJR 2-G created five Senate seats wholly within Dade County (Districts 34, 36, 37, 38 and 39) and two Senate seats (Districts 32 and 40) that are made up of a part of Dade County and a part of an adjoining county — one to the north and one to the south.[3] Hispanics constitute a majority of the VAP in three of the Senate districts wholly within Dade County; African-Americans constitute a majority in one of the two remaining districts wholly contained within the County, as well as a controlling plurality in one of the two districts partly in the County;[4] and whites constitute a majority in the final two districts. U.S. Ex. 7, p. 24-25.

---

[2] The major countries of origin for Dade County's Hispanics are Cuba, Nicaragua, Puerto Rico, Colombia, The Dominican Republic, Mexico, Honduras, Peru, and Guatemala. U.S. Ex. 37, Table 3.

[3] The fact that two of these districts extend from Dade County into a neighboring county is a result of geography and has never been challenged on Section 2 or constitutional grounds. The southernmost county in Florida (directly below Dade) is Monroe County, which has approximately 78,000 people. That county is joined with approximately 246,000 people from south Dade County and downtown Miami to achieve a district that is approximately the same size as the other 39 Senate districts. By the same token, a second district with approximately 76,000 residents in North Dade is filled out with approximately 248,000 persons from adjacent Broward County.

[4] The district court found that in District 40, "African-Americans can elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a.

On April 13, 1992, pursuant to Art. III, § 16(c), of the State Constitution, the Florida Attorney General petitioned the Florida Supreme Court for judicial review of SJR 2-G.[5] On May 13, 1992, the state court held that SJR 2-G was valid and approved it. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 597 So.2d 276 (Fla. 1992). Thereafter, the Florida Attorney General submitted the Plan to the United States Department of Justice for preclearance review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[6] On June 16, 1992, the United States issued its preclearance decision, stating that its sole objection was to the Plan's Senate districts because of a problem it perceived in the Hillsborough County (Tampa) area. U.S. Ex. 16. In response, on June 22, 1992, the Florida Supreme Court amended the Plan to remedy this objection. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 601 So.2d 543 (Fla. 1992).

The De Grandy appellants fully participated in the proceedings before the Florida Supreme Court, arguing that SJR 2-G violated the Voting Rights Act because it failed to create additional majority-minority districts. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 597 So.2d 276, 284 (Fla. 1992). Concentrating on Dade County's Senate districts, the appellants contended that a fourth majority Hispanic Senate

---

[5] Art. III, § 16(c), Fla. Const., provides as follows:

> (c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

[6] Five of Florida's counties are subject to the preclearance requirements of Section 5. Dade County is not one of them.

district should have been created. *Id.* The Florida Supreme Court rejected this contention, finding that the Plan did not discriminate against minorities. *Id.* at 285. Furthermore, the Court concluded that the Plan is a material improvement over conditions that existed under the 1982 plan because it provides minorities with substantial opportunities to influence elections and to elect representatives of their choice. *Id.* The Court's ruling, made under tight time limitations, was without prejudice to any interested party's right to file a subsequent petition before it, alleging a violation of Section 2 of the Voting Rights Act. *Id.* The De Grandy appellants declined to file such a petition, choosing instead to seek leave to amend the complaint that they had previously filed in federal court.[7]

3. *The Federal Court Proceedings.* In their amended complaint in federal court, the De Grandy appellants raised the same Section 2 claims against the Senate Plan, again seeking a fourth majority Hispanic district in the Dade County area. The district court, which had been designated as a three-judge court pursuant to 28 U.S.C. § 2284, granted appellants' motion to amend on June 22, 1992. On June 23, 1992, the United States filed a complaint in the district court, alleging the same Section 2 violation raised in the De Grandy appellants' amended complaint with regard to Dade County's Senate districts. On June 26, 1992, the district court consolidated for trial the complaints of the De Grandy appellants and the United States, along with another complaint by the NAACP.[8]

The trial began on the same day that the court entered its consolidation order and lasted five days, until July 1, 1992.

---

[7] The De Grandy appellants initially had filed a complaint in the District Court for the Northern District of Florida on January 14, 1992. The complaint alleged, among other things, malapportionment (under the 1982 Plan) and prayed for the district court's intervention to redraw Florida's legislative and congressional districts. The subsequent passage, approval, and modification of SJR 2-G mooted this initial claim.

[8] The NAACP also had filed a complaint in the same district court, on April 10, 1992, alleging malapportionment against African-Americans.

Purporting to rely on the decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), plaintiffs below attempted to prove that the Senate Plan violated Section 2 by demonstrating that it failed to *maximize* Hispanic voting strength in Dade County. Testimony of Daryl Reaves, Tr. II, 179, 184; Testimony of Allan Lichtman, Tr. III, 28-31; Testimony of Miguel De Grandy, Tr. II, 153-154. The De Grandy appellants and two intervening parties introduced alternative plans containing an additional majority VAP Hispanic district.[9]

In response, the Senate defendants presented four arguments and supporting evidence. First, they claimed that the Voting Rights Act does not require maximization of minority voting strength. Tr. VIII, 45-46, *see also* argument of Executive Defendants, Tr. VIII, p.51. Second, they argued that the Plan provided Hispanics with a meaningful opportunity to elect candidates of their choice at a level equal to their proportion of the Dade County population, even though the Voting Rights Act does not require such proportional representation. *Id. See also* Testimony of Ron Weber, Tr. VI, 48. Third, they contended that Hispanics were afforded more than a proportional share of Dade County's senatorial districts in view of the facts that 55 percent of voting age Hispanics in Dade County are not citizens and that only 31 percent of the total citizen voting age population in Dade County is Hispanic. Testimony of William De Grove, Tr. VII, p. 20; Testimony of Ron Weber, Tr. VI, 53. Finally, the Senate defendants and the NAACP presented evidence to show that the creation of an additional Hispanic district in Dade County would dilute African-American voting strength in that area. Testimony of John Gutherie, Tr. IV, 153-158, 178-186; Testimony of Ron Weber, Tr. VI, 47, 68, 135-136; Testimony of Leon Russell, Tr. III, 110, 127.[10]

---

[9] Humphrey, *et. al.*, and Hargrett, Brown and Reaves submitted virtually identical alternative plans.

[10] The Senate defendants also argued that appellants had failed to satisfy the third so-called "*Gingles* precondition" (*see Thornburg v. Gingles*,

4. *The District Court Decision.* On July 2, 1992, the day after trial, the district court entered its final judgment, upholding the Senate Plan. U.S. App. 5a.[11] With respect to appellants' Section 2 claim, the judgment provides that "[t]he state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 *et seq.*)." U.S. App. 5a.[12]

---

478 U.S. 30 (1986)), which requires that Section 2 plaintiffs demonstrate their failure to elect their candidates of choice because of polarized voting. Tr. VIII, 41-42. Tr. V, 36-38. The SenateDefendants presented evidence demonstrating that Hispanics in Dade County have enjoyed sustained success in electing their candidates of choice at a percentage that exceeds their voting strength. Testimony of Ron Weber, Tr. VI, 60-61, 67-68.

[11] The United States and the De Grandy appellants have both reprinted the judgment and opinion below in Appendices to their respective jurisdictional statements. We will cite the Appendix filed by the United States as "U.S. App."

[12] The remainder of the judgment, paragraphs 1, 2 and 4, provides:

> 1. The State of Florida's state senatorial districts embodied in Senate Joint Resolution 2-G, as modified by the Florida Supreme Court on June 25, 1992 ["1992 Florida Senate Plan"] do not violate Section 5 of the Voting Rights Act of 1965, as amended, (42 U.S.C. § 1973 *et seq.*).
>
> 2. The Court adopts the 1992 Florida Senate Plan as the plan to be utilized in the 1992 Florida Senate elections and in Florida State Senate Elections thereafter.
>
> * * * *
>
> 4. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall:
>
> (a) conduct state senatorial elections in 1992 in accordance with the 1992 Florida Senate Plan, a map and written description of which is attached to this Judgment;
>
> (b) conduct state senatorial elections in years after 1992 in accordance with the 1992 Florida Senate Plan.

U.S. App. 5a.

Although no written post-judgment motions for amendment or reconsideration were filed by any appellant,[13] the district court issued an opinion fifteen days later (on July 17, 1992), concluding that the Senate Plan violated Section 2 as to both Hispanic and African-American voters, but that neither violation could be remedied without impairing the interests of the other minority group. The court stated:

> We held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act of 1965, as amended. (Doc. 553.) This language should be read as holding that the Florida Senate Plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate Plan violates Section 2 of the Voting Rights Act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area.

U.S. App. at 72a.

In support of its new conclusion, the court found that the three *Gingles* preconditions — set forth by this Court in a *multimember district* Section 2 case — had been satisfied by both minorities in this *single-member district* case. *Gingles*, 478 U.S. 30. Specifically, the court found that (1) each minority group, viewed independently, is "sufficiently large and geographically compact" to support an additional district in Dade County (U.S. App. 30a-42a);[14] (2) each minority is "politically cohesive" within its own group (*id.* at 44a); and

---

[13] After the court's ruling from the bench on July 1, the De Grandy plaintiffs made an oral motion for reconsideration, which was denied. Tr. VIII, 61. No written motions for reconsideration were filed after the court issued its judgment on July 2.

[14] In its evaluation of numerosity and compactness, the court eschewed consideration of minority coalitions and white cross-over voting. In its subsequent evaluation of remedies, however, the court did consider these factors. *See* pp. 24-25, *infra*.

(3) each minority has had its candidates defeated by "white bloc voting" (*id.* at 48a-53a). The court also found that both groups had suffered discrimination in areas other thn voting. *Id.* at 54a. The court concluded that Hispanic and African-American vote dilution exists in Dade County in violation of Section 2 of the Voting Rights Act. *Id.* at 54a-55a.

The district court then held that the best remedy for these violations was the Florida Senate Plan itself. Based on the record — including the alternative plans submitted by the other parties — the court found "that the creation of a fourth Hispanic VAP supermajority district would adversely affect African-Americans in South Florida and that the creation of a third [African-American] VAP majority district would adversely affect Hispanics in Dade County." *Id.* 64a.[15] The court thus concluded that "the Florida Senate Reapportionment plan is the fairest to all ethnic communities in Dade County and the surrounding areas." *Id.* at 66a.[16]

REASONS TO DISMISS OR AFFIRM

The district court's judgment, by its terms, provides that "[t]he state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan *do not violate* Section 2 of the Voting Rights Act." U.S. App. 5a (emphasis added). Under this Court's settled precedent, that judgment — and not the contrary holding in the district court's subsequent opinion — frames the appropriate scope of the issues presented for review. Consequently, the jurisdictional statements of the De Grandy and United States appellants — which solely raise issues about remedies — must both be

[15] The court had previously ruled that Hispanics need a supermajority (more than 60 percent) of the VAP to elect representatives of their choice, while African-Americans require only a simple majority of the VAP. *Id.* at 57a, 59a.

[16] Judge Vinson joined the court's opinion, but wrote separately to emphasize the points that he considered dispositive. *Id.* at 73a-76a.

dismissed because they are premised on a finding of violation that not only is not presented by the judgment, but squarely contradicts it.

Alternatively, the district court's judgment holding that there was no violation in this case should be summarily affirmed on the merits for two reasons. First, the undisputed facts show that the Florida Senate Plan guarantees both Hispanic and African-American voters in Dade County control over a *greater* proportion of Senate seats than their proportion in the overall voter population. That fact, standing alone, demonstrates that these voters do *not* have "less opportunity than other members of the electorate...to elect representatives of their choice." Section 2, codified at 42 U.S.C. § 1973. Second, as the three-judge court found in its July 17, 1992, opinion, "the Florida Senate Reapportionment plan is the *fairest to all ethnic communities* in Dade County and the surrounding areas." U.S. App. 66a (emphasis added). That factual finding is amply supported by the evidence and also conclusively demonstrates that no violation occurred here.

In disregard of the plain language of the judgment and the compelling evidence to support the district court's conclusion that the Florida Senate Plan does not violate Section 2, the United States argues that "[t]he 'Court should hold this appeal pending its decision in *Voinovich v. Quilter*, No. 91-1618, and should subsequently summarily reverse the district court's remedial order with directions to conduct remedial proceedings to determine the appropriate remedy.' " U.S.J.S. at 19. Both halves of the suggestion are misguided. The issues in *Voinovich* are entirely distinct from those presented here, and in no event would summary reversal be indicated, given the compelling grounds for affirming the district court's judgment of *no* liability. Notably, the De Grandy appellants — who are aligned with the United States in claiming that an additional Hispanic Senate district must be created — argue only that "probable jurisdiction should be noted." De Grandy J.S. at 29.

I. THE APPEALS SHOULD BE DISMISSED BECAUSE THE JUDGMENT DOES NOT RAISE THE QUESTIONS PRESENTED BY APPELLANTS.

These appeals should be dismissed because all of the questions presented are premised on a false assumption — that the court below found a violation of Section 2 but refused to order relief. In fact, the judgment of the court expressly found no such violation. It was only in the court's opinion, entered 15 days later, that the court changed course, now stating that there was a violation but that the existing plan was the best available remedy. In deciding what issues are properly before this Court, that opinion has no legal effect. It follows that the questions offered by appellants are not even "presented" in this case.

It is axiomatic that this Court "reviews judgments, not statements in opinions." *California v. Rooney,* 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Lab.,* 351 U.S. 292, 297 (1956)). Here, the district court on July 2 set forth its "judgment" in a separate, formal document, as required by Fed. R. Civ. P. 58. That judgment remains legally in effect, and is the sole *ruling* that appellants are able to challenge here. After judgment was entered, no party made a motion to amend the judgment. *See* Fed. R. Civ. P. 59(e) (permitting such a motion within ten days). The court itself had the power to amend the judgment substantively within ten days, but did not exercise that power. *See* 6A *Moore's Federal Practice* ¶ 59.12[4], at 59-274 to 59-275 (2d ed. 1992) (court has power to amend judgment *sua sponte,* but if the change is substantive, rather than based on a clerical error of the sort contemplated in Fed. R. Civ. P. 60(a), it must be effected within ten days). Instead, the court issued an opinion 15 days after the judgment, purporting to "clarify" its judgment.

As a matter of law, that opinion could not transform the court's judgment from one finding no liability under Section 2,

as the judgment states, to one finding liability with no available remedy. While an opinion may sometimes help in the interpretation of an *ambiguous* judgment, it cannot make a substantive *change* under the guise of "clarification." *See* 6A *Moore's Federal Practice* ¶ 58.02, at 58-10. *Cf. Birdsong v. Wrotenbery,* 901 F.2d 1270, 1271-72 (5th Cir. 1990) (motion for clarification seeking substantive change in judgment must be treated as a motion to *amend* judgment under Rule 59(e)). *See also Aoude v. Mobil Oil Corp.,* 862 F.2d 890, 895 (1st Cir. 1988) (where court filed findings two months after injunction order, no prejudice to appellant because there was no inconsistency between earlier order and later findings); *Krull v. Celotex Corp.,* 827 F.2d 80, 81 (7th Cir. 1987) (where court merely memorializes previously rendered order within a reasonable time *without significantly altering the substance* of order, subsequent opinion is *nunc pro tunc* and is within court's power). In short, when as here a judgment is clear and not amended, its plain terms remain controlling. Indeed, the contrary view flatly contravenes the requirement in Rule 58 that a court's judgment be set forth in a separate document.

The United States attempts to suggest that the judgment was ambiguous because, while it found no liability under Section 2, it ordered the State to adopt its own Senate Plan. U.S.J.S. at 9 n.7. But there was nothing inconsistent about these two features of the judgment. The court's order requiring the State to comply with the Senate Plan was merely a formalization of an earlier oral ruling, which was made in order to eliminate the need for further *Section 5 preclearance* by the Justice Department. U.S. App. 20a; Tr. I, 37. *See McDaniel v. Sanchez,* 452 U.S. 130 (1981) (court-imposed plans do not require preclearance but plans reflecting the policy choices of elected representatives, even if enacted in response to court orders, do require preclearance).

The judgment below was thus clear and logical. The court's later opinion, far from "clarifying" it, simply contradicted it. In such circumstances, it is uniformly recognized that the judgment is what constitutes the ruling of the court. *See Eakin v. Continental Illinois Nat. Bank & Tr. Co.*, 875 F.2d 114, 118 (7th Cir. 1989) ("[j]udicial opinions do not create obligations; judgments do.... In the event of a conflict between the opinion and the judgment, the judgment controls"); *Syntex Pharmaceuticals v. K-Line Pharmaceuticals*, 905 F.2d 1525, 1526 (Fed. Cir. 1990) (statement in court's opinion was not a judgment within Rules 54 and 58); *Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 727 (3rd Cir. 1988) (operative act is the order).

Despite these settled principles, however, the "questions presented" by both appellants are all premised on the assumption that the district court found a violation of Section 2. Those questions, of course, determine the issues that will be considered by the Court. *See* Sup. Ct. R. 24.1(a) (merits brief "may not raise additional questions or change the substance of the questions already presented" in the jurisdictional statement). In light of the fact that appellants have misconstrued the judgment in this case, it cannot be concluded that the questions they present raise substantial issues justifying an appeal. The appeals accordingly must be dismissed.[17]

---

[17] The United States notes this problem in a footnote, arguing that if the "no-violation" holding of the judgment were to be read literally, "the issues before this Court would remain substantially the same." U.S.J.S. at 9 n.7. This is incorrect. A conclusion that the judgment is controlling would leave appellants only the option of arguing that they presented sufficient evidence to require a finding of *liability* under Section 2. They have not presented that issue in their questions presented, focusing instead on the question whether a court may find liability but deny relief.

II. THE UNDISPUTED FACTS DEMONSTRATE THAT HISPANIC VOTERS IN DADE COUNTY HAVE MORE THAN AN EQUAL OPPORTUNITY TO ELECT REPRESENTATIVES OF THEIR CHOICE.

Unlike many voting rights cases, this one is easy. While the De Grandy and United States appellants contend that Hispanic voters are entitled to an additional majority district in Dade County, the fact is that, under the Senate Plan which appellants challenge, Hispanics already have a better chance to elect representatives of their choice than do white voters. Given that fact, it is simply not possible to find a Section 2 violation here. The judgment below can and should be affirmed solely on this ground. No party has challenged the three-judge court's ruling with respect to the Section 2 rights of African-Americans. The following discussion, therefore, will focus largely on the claims of Hispanic voters, which are represented by the De Grandy appellants and the United States.

1. Section 2 of the Voting Rights Act assures that members of a protected minority group are not given "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their own choice." Thus, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black [or other minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). In that regard, "[i]t is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" *Id.* at 48 n.15 (quoting Section 2).

This essential showing of unequal opportunity cannot be made in this case. On the contrary, under the Senate Plan

that both appellants challenge, Hispanic voters in Dade County are assured the ability to elect more than a fair share of representatives of their own choice. Hispanic voters thus do not face any obstacle to, much less a substantial difficulty in, electing their preferred representatives.

The principle that we rely on to support this conclusion is illustrated by a simple hypothetical. Suppose, for example, that (1) Hispanics comprised 50 percent of the potential voters in Dade County, (2) the Florida legislature divided Dade County into six equal-size Senate districts, and (3) Hispanics were distributed among the six Dade districts such that they had clear numerical voting control in three of them. Unless words have no meaning, this arrangement cannot be said to afford Hispanics "less opportunity...to elect representatives of their choice" than that available to "the other members of the electorate" in Dade County. Indeed, this Court already has held that "persistent proportional representation is inconsistent with [the] allegation that the ability of black voters...to elect representatives of their choice is not equal to that enjoyed by the white majority." *Gingles*, 478 U.S. at 77.[18]

The force of this argument is further bolstered by the fact that Section 2 disavows "establish[ing] a right to have members of a protected class elected in numbers equal to their proportion in the population." Given that provision, it would take an entirely perverse reading of the statute to hold that, despite proportional representation (or, as here, extra-proportional representation), there could still be a violation. *See, e.g., Nash v. Blunt*, 797 F. Supp. 1488, 1496 (W.D. Mo. 1992) (three-judge court) (a requirement to go beyond proportional

---

[18] Because *Gingles* involved "at large" elections in multimember districts, the Court found that one or even two elections resulting in proportional representation were insufficient to disprove a violation. *Compare* 478 U.S. at 74-76, *with id.* at 77. In this case, by contrast, single-member election district lines are redrawn based on federal census data every ten years, so proportional representation, once established, is sure to endure absent unforeseen demographic changes.

representation imposes "a continuing duty to minimize representation by majority groups — a concept probably more controversial than proportional representation, which, as noted above, was specifically rejected by Congress"); *see also Turner v. Arkansas*, 784 F. Supp. 553, 577 (E.D. Ark. 1991) (three-judge court), *sum. aff'd*, 112 S. Ct. 2296 (1992).

2. The facts of this case are substantially identical to those presented in the dispositive hypothetical just discussed. In fact, when the distinction between all Hispanics and potential Hispanic voters (*i.e.*, U.S. citizens) is taken into account, Hispanics achieve considerably *more* than proportional representation in Dade County. For simplicity's sake, we will look first at the numbers based on total voting age population (regardless of citizenship), and then make an appropriate adjustment to take into account the fact that Section 2, by its terms, applies only to a "denial or abridgement of the [voting] right of any *citizen* of the United States." 42 U.S.C. § 1973(a) (emphasis added).

There are two possible ways to view the numbers here — both of which demonstrate that Dade County Hispanics have a better than equal opportunity to elect state Senators of their choice. First, the analysis can be done only within Dade County; and second, the analysis can be done across the seven Senate districts actually established by the Florida legislature, five of which are wholly within Dade County and two of which are made up of portions of Dade and adjacent counties.

As for the first situation, Dade County, on a *pro rata* population basis, is entitled to almost exactly six Senate seats (out of a total of forty statewide). *See* p. 3, note 1, *supra*. Hispanics comprise 50 percent of the total voting age population in Dade County and thus, on a straight proportionality basis, would have been entitled to three seats. That is, of course, the number that they received — three of the districts in Dade are *more than 64 percent* Hispanic in population (76.1%; 66.3%; 64.3%). *See* U.S. App. 55a.

The fact of proportional representation is also confirmed by looking at the seven districts that are wholly or partially in Dade County. Among those, Hispanics make up approximately 45 percent of the total voting age population (not limited to citizens), and they continue to have the same 64 percent-plus majority in three out of the seven seats, which amounts to 43 percent of the seats. *See* U.S. Ex. 20, 16-17. In other words, the Hispanic percentage of the population is almost identical with the Hispanic percentage of electoral dominance in the seven Senate districts.

On the other hand, if Hispanics were given control over a fourth seat — as both the De Grandy and United States appellants claim Section 2 requires — they would be substantially overrepresented, because they would then have a 57 percent share of the seats, while other groups (either whites or African-Americans) would necessarily be correspondingly underrepresented.[19]

These numbers become even more dramatic when they are adjusted to reflect citizenship. *See, e.g., Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir. 1989). As the court below properly found, "[Dade County] Hispanic communities are characterized by a large number of non citizens." U.S. App. 39a; *see id.* 40a n.28. Even using the most conservative estimates, the expert testimony in this case indicated that Hispanics make up less than 40 percent of the voting age citizens in Dade County and less than 35 percent of such citizens in the seven districts. *See* Testimony of William De Grove, Tr. VII, pp. 17-20; Testimony of Ron Weber, Tr. VI,

[19] Within these 7 Senate districts, the African-American VAP is 15 percent of the total VAP, U.S. Ex. 20, pp.16-17, and African-American voters have the opportunity to elect representatives of their choice in 29 percent (two of seven) of the districts. The non-Hispanic white VAP in the 7 districts is 39 percent, U.S. Ex. 20, pp. 16-17, and whites have a voting age majority in 29 percent (two of seven) of the districts.

48-53.[20] Consequently, the ability of Hispanic citizens to control 50 percent of the potential seats in Dade County alone and 43 percent in the seven Senate districts at issue indicates that they have substantially better than an equal opportunity to elect representatives of their choice than do white voters.[21] Section 2 of the Voting Rights Act requires no more.

3. The court below, in its July 17 opinion, completely ignored these dispositive considerations, never even mentioning the relevant numbers. Instead, the court read into Section 2 a principle of maximization, leading to the remarkable conclusion that the statute essentially required four Hispanic-controlled and two African-American-controlled districts in Dade County. *See* U.S. App. 40a-41a. Conversely, the 32 percent of white VAP in Dade County (and the approximately 40 percent white proportion of the citizen VAP) would, given the court's findings of racial cohesiveness

[20] While not available to the appellees at the time of trial, official United States Census Bureau data from 1990 indicate that, in Dade County — which, as indicated, contains a higher percentage of Hispanics than the seven districts as a whole — Hispanics make up 35.4 percent of the total voting age *citizen* population. Memorandum for the Record from Robert Kominski, Chief, Education & Social Stratification Branch, Bureau of the Census, United States Department of Commerce (June 8, 1992) and associated tabulations. Consequently, the numbers in text actually understate Hispanic overrepresentation. The Court can readily take judicial notice of this official census information because it is "not subject to reasonable dispute in that it is...capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201 F. R. Evid. *See Massachusetts v. Westcott,* 431 U.S. 323, 324 n.2. (1977); *Bowles v. United States,* 319 U.S. 33 (1943). Indeed, throughout these proceedings, all parties have consistently relied on census data.

[21] No one has challenged whether the three supermajority Hispanic VAP districts in the Senate Plan — all which have an Hispanic VAP of 64 percent or more — will enable Hispanics to "elect candidates of their choice." The districts in the Senate plan clearly comport with the district court's guidelines for an effective supermajority Hispanic VAP district, which include taking into account citizenship.

and bloc voting (*id.* at 44a-53a), have no opportunity to elect representatives of *their* choice. Nothing in the language of Section 2 or its legislative history supports that extreme conclusion. In *Turner* the district court noted, "the Supreme Court has rejected any claim to proportional representation or 'maximum feasible representation' throughout the history of the Voting Rights Act." *Turner,* 784 F. Supp. at 578.

The district court's reliance on *Gingles* to support its contrary result is mistaken. The decision and analysis in that case was expressly limited to "vote dilution through the use of *multimember* districts." 478 U.S. at 42 (emphasis added); *see also id.* at 46 n.12 (emphasizing limitation of the analysis and holding). In that specific context, the Court adopted the three so-called "Gingles preconditions": "First, the minority group must be able to show that it is sufficiently large and geographically compact to constitute a majority in a single-member district.... Second, the minority group must be able to show that it is politically cohesive.... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc...to defeat the minority's preferred candidate." *Id.* at 50-51. The district court in this case found that these three conditions had been established and, essentially on that basis, concluded that a violation as to both Hispanics and African-Americans had occurred, even though both groups are overrepresented in numerical terms.

This kind of reflexive, mechanical application of *Gingles* — in derogation of the statutory language — is nonsensical. It is one thing to conclude that the three *Gingles* factors make out a violation when they are shown to exist in a *multi*member district — where, by definition, a minority group consistently runs the risk that the majority can outvote it on all candidates. But it is an entirely different thing to hold that these factors govern in a case where *single*-member districts are at issue and the minority group is able to control more than its proportionate share of such districts. *Cf. Gingles,* 478 U.S. at 50 n.17 ("[t]he single-member district is generally

the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected").[22]

Not only did the district court fail to address the issue of proportionality, or even mention the relevant numbers, but the De Grandy appellants and the United States have now chosen to follow suit. Thus, both appellants assume a violation — even though the judgment says precisely the opposite — and then immediately turn to the issue of remedy. This is an especially telling evasion by the United States because, in *Gingles,* "the United States contend[ed] that if a racial minority gains proportional or *nearly proportional* representation in a *single* election, that fact alone precludes, as a matter of law, finding a § 2 violation." 478 U.S. at 75 (emphasis added). Here, more than proportional representation is assured for a decade.

In any event, we submit that neither the De Grandy appellants nor the United States can provide any principled defense for the liability ruling in the district court's July 17 opinion. The United States, in its response to the jurisdictional statement of the Florida House of Representatives (No. 92-519, *Wetherell v. De Grandy*), has argued that "when plaintiffs make a statewide claim of vote dilution involving a legislative body with statewide jurisdiction, the relevant area for determining a proportional representation defense must be the entire state as well." U.S. Motion to Affirm in Part and Vacate in Part at 13. In other words, even if a protected minority is proportionally represented in a single-district system in areas where it has a substantial, geographically compact presence, there can still be a Section 2 violation if the

---

[22] The court below also sought to buttress its ruling by finding, in addition to the three *Gingles* conditions, that Hispanics and African-Americans had also been discriminated against in areas other than voting. U.S. App. 53a-54a. This fact, however, similarly has no bearing on the overriding point that both groups had more than their proportionate share of representation in Florida's Senate districts.

statewide percentage of that minority is not proportionally represented in the statewide plan. For example, if Hispanics constitute half the voting population in Dade and they receive voting majorities in 3 of Dade's 6 seats, that would still amount to a violation if, based on Hispanics dispersed throughout the rest of Florida, the overall statewide percentage of Hispanics is 10 percent, in which case Hispanics must be given majorities in 4 districts out of the total of 40. This argument does not help the United States here, makes no sense, and was expressly disavowed in the court below.

First, under the Florida Senate Plan, Hispanics are proportionally represented even on a statewide basis. Thus, as the United States acknowledges, the official 1990 census data show that "Hispanics constitute 7.15% of the citizen voting age population of Florida." U.S. Motion to Affirm in Part and Vacate in Part at 14 n.5. Using that figure, Hispanics would be entitled to majority representation in 3 Senate districts (7.15% x 40). That is, of course, the number of districts in which Hispanics have an effective majority under the Senate Plan — *i.e.*, the three districts in Dade County.[23]

Second, under Section 2 of the Voting Rights Act, the statewide focus advanced by the United States here has no basis whatever. On the contrary, such an approach takes the notion of "maximization" to unprecedented heights, by artificially concentrating and thus inflating only minority presence within a single district of a multi-district plan. It is difficult to see, in a single member district plan, what relevance minority citizens in north Florida have to the *voting rights* of minority citizens several hundred miles

---

[23] The United States asserts that the "Census Bureau figures [concerning the percentage of Hispanic citizens in Florida] are not in the record in this case and therefore not properly before this Court." *Id.* at 14 n.5. This suggestion is nonsense. *See* p. 19, note 20, *supra*. The United States does not — nor could it — give a reason why a remand would be appropriate to consider undisputed census figures.

away in south Florida. In fact, aggregating these separate voters flies directly in the face of the first *Gingles* precondition of "geographic compactness." 478 U.S. at 50. Not surprisingly, the United States cites no authority to support its novel view. On the contrary, the only case to consider such a claim flatly rejected it. *See*, *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992).

Lastly, the United States's attempt to inject this new argument at this point in the litigation is patently unfair. The United States (and the De Grandy appellants) charged not that there was "statewide" vote dilution but only that the Florida Plan "dilute[s] the voting strength of Hispanic citizens in several *areas* of the state." U. S. Complaint ¶ 8 (reprinted in U.S. Motion to Affirm in Part and Vacate in Part at 3a). At trial, moreover, the court ruled — and the parties agreed — that "we're going to only consider evidence as to three counties: *as to the Senate Plan, Dade County;* as to the House Plan, Dade County, Escambia County, and Alachua or the Alachua area. We're not interested in hearing other matters." Tr. I, 101 (emphasis added). The court also emphasized the importance of this limitation, admonishing the plaintiffs that "you must tell these defendants now the exact counties that you're talking about." *Id.* at 103. The United States's desperate attempt to change the contours of this litigation now that its position below turns out to be indefensible in this Court should be rejected.

In sum, there is simply no way to view the hard numerical facts about Dade County — or the State of Florida — and conclude that the Florida Senate Plan affords Hispanics "less opportunity than other members of the electorate...to elect representatives of their own choice." The district court's judgment finding no liability, therefore, should be summarily affirmed.

III. THE DISTRICT COURT'S FACTUAL FINDING THAT THE FLORIDA SENATE PLAN MOST FAIRLY BALANCES THE COMPETING INTERESTS OF AFRICAN-AMERICAN AND HISPANIC VOTERS ALSO DEMONSTRATES THAT THE PLAN DOES NOT VIOLATE THE VOTING RIGHTS ACT.

The district court's judgment that the Florida Senate Plan does not violate Section 2 should be affirmed for a second, reinforcing reason. The court found that, of "all the plans presented to the court, the *Florida Senate Reapportionment plan is the fairest to all the ethnic communities* in Dade County and the surrounding areas." U.S. App. 66a (emphasis added). In particular, the court elaborated, "[t]he state of Florida, faced with the competing interests of Hispanics and African-Americans in Dade County, sought to strike the fairest balance in its Senate reapportionment plan." *Id.* at 63a-64a.

The district court's factual finding that the Florida Senate Plan most fairly balances the competing interests of both affected minority groups is fully supported by the evidence. That finding, in turn, compels the conclusion that there was no Section 2 violation here: if a state plan, viewed through the prism of *maximizing minority interests,* can violate Section 2 even though it is found to be "fairest" in balancing such interests when they are "at odds" with one another (U.S. App. 44a), it is impossible to imagine a plan that would not be in violation.

1. The district court's dispositive conclusion that the Florida Senate Plan most fairly balances the "competing interests of Hispanics and African-Americans" is indisputably a factual finding and thus cannot be disturbed unless "clearly erroneous." Rule 52(a), Fed. R. Civ. P. Indeed, this Court has already held that "the ultimate finding of vote dilution [is] a question of fact subject to the clearly-erroneous standard of Rule 52(a)." *Gingles,* 478 U.S. at 78. The district court's

"fairness" finding here is precisely such a finding. *See* U.S. App. 63a (creation of an additional Hispanic district, as sought by appellants, would "dilute the African-American vote").

This factual finding is certainly not clearly erroneous. It rests on an analysis of "all of the evidence" (*id.* at 63a), beginning with the evidence showing that, under the Florida Senate Plan, Hispanics and African-Americans are each effectively able to control three districts in south Florida, including one district where African-Americans have less than a majority of potential voters but can still "elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a. (Notably in this regard, when the Florida Senate elections were subsequently held under the State's Plan on November 3, 1992, three Hispanics and three African-Americans were elected in south Florida, just as the court had anticipated.)

The court's finding is also fully supported by the evidence regarding the effect of moving district lines in an attempt to create a fourth Hispanic district. Reviewing two separate plans that had sought to do so, the court found that the first (submitted by the De Grandy appellants) was not a "viable option": *i.e.*, it would not, in fact, create a fourth Hispanic district because the numerical strength of Hispanics in that district would be too low. U.S. App. 58a n.46. And, as for the other plan, which did create four Hispanic districts, the court found that it "is retrogressive to African-Americans in Dade County and the surrounding areas" because it imperiled their ability to elect a third representative. *Id.* at 63a.

In sum, the court's ultimate finding that the Florida Senate Plan was fairest in accommodating the competing interests of two *minority* groups is solidly grounded in the record. This finding leads directly to the legal conclusion that the Plan does not violate Section 2: Nowhere in the text or legislative history of the Voting Rights Act is there the slightest hint that a good faith effort to accommodate such competing

interests could possibly give rise to a violation. *A fortiori,* a plan that is actually found to be the "fairest" in balancing those interests does not violate the statute.

The court below nevertheless reached a contrary conclusion in its opinion, holding that the Florida Senate Plan violated the rights of both Hispanics and African-Americans, but that since it was still the fairest plan available, it would be adopted as a remedy. That holding rests on a fundamentally flawed legal conclusion — that a plan which most fairly balances the competing interests of minority groups is unlawful under Section 2. But this obvious legal error does not infect the court's underlying factual finding. And that finding provides a compelling ground for summarily affirming the district court's judgment, which correctly held that the Senate Plan does "not violate Section 2 of the Voting Rights Act." U.S. App. 5a.

2. The United States and the De Grandy appellants never come to grips with the district court's dispositive fairness finding or its inescapable implication that no violation occurred here. Instead, they devote their efforts to arguing that they must be given yet an additional opportunity to redraw Florida's Senate districts in an attempt to show that they can create four Hispanic and three African-American districts in the Dade area. The United States also suggests that this case should be held for *Voinovich v. Quilter,* No. 91-1618 (pending). These arguments are meritless.

a. Appellants' request for further remedial hearings is an unwarranted diversion. The United States and the De Grandy plaintiffs were fully on notice that the district court would be considering alternative plans. In fact, as just noted, the De Grandy plaintiffs submitted a plan with a proposed fourth Hispanic seat prior to trial, so that it could be so considered, as did a group of plaintiff-intervenors (referred to as the "Reaves plan" in the opinion below). The NAACP also submitted a plan. And while the United States did not file a separate plan, it supported the De Grandy and the Reaves alternatives. Tr. I, 58. The district court then evaluated each of these plans and found that none could create a fourth Hispanic seat without simultaneously impairing the interests of African-American voters. *See* U.S. App. 64a.

Appellants nevertheless argue that still more plans must be considered at a further hearing because not until after trial were the parties "informed for the first time that a 4-3 plan was necessary to remedy the Section 2 violations." U.S.J.S. at 14. But this claim is totally without merit because, as the United States concedes, the district court made clear throughout the proceedings that it was concerned about and would hear evidence on "whether establishment of a fourth Hispanic district would have a regressive effect on African-American voters." *Id.* at 4-5 (citations omitted). In response, such evidence was submitted both by the NAACP and by appellees. *See* p. 7, *supra*. There is thus no basis on which appellants can claim that they were taken by surprise and inadvertently submitted or supported a plan with four Hispanic seats, without regard to its potentially regressive effect on African-American voters.

The simple fact is that an electoral map with four Hispanic districts cannot reasonably be drawn in the Dade County area without simultaneously disadvantaging African-Americans. Both proposals that attempted to do otherwise already went far beyond the compact seven district area covered by the Florida Senate Plan — involving in one instance 8 new counties (outside Dade, Monroe and Broward) and an area up to 110 miles wide extending 125 miles north of Dade County, and in the other instance 7 new counties and an area up to 55 miles wide extending 145 miles north of Dade County. *See* Senate Def. Ex. 3 and 4. If, within that incredibly wide swath, two separate plans, while obviously trying to do so, could not create a fourth Hispanic seat without having a negative impact on African-American voters, it is time to end the inquiry. Indeed, appellants have already gone far beyond the point where even the first *Gingles* precondition — "geographic compactness" — can be said to apply.

b. The United States also argues that this case should be held pending this Court's decision in *Voinovich v. Quilter*, No. 91-1618. Even as articulated by the United States, the argument has no force: it rests on vague speculations about potential legal issues that suggest only the most attenuated link between the two cases. Upon scrutiny, moreover, the United States's argument is even weaker than it appears.

Voinovich involved a claim that an Ohio reapportionment plan "unnecessarily packed black voters into electoral districts and fragmented other concentrations of black voters in violation of Section 2." Br. for the U.S. as *Amicus Curiae* in *Voinovich* at 4. The three-judge district court rejected the Ohio plan, concluding that the "wholesale creation of majority-minority districts" violated Section 2 unless the State could first demonstrate that a Section 2 violation already existed. *Quilter v. Voinovich* 794 F. Supp. 695, 701 (N. D. Ohio 1992). The court then found that Ohio had not made the requisite showing in that case. *Id.* The issues on appeal, as the briefs (including that of the United States) demonstrate, concern "whether the district court erred in holding that the State of Ohio violated Section 2 of the Voting Rights Act, by adopting a legislative redistricting plan that created majority-minority electoral districts despite the absence of proof that creation of such districts was required in order to remedy a violation of the Voting Rights Act." U.S. Br. at 6.

Neither that issue — nor anything remotely like it — is presented in this case, which involves not alleged "packing" of minorities but alleged "dilution" of minorities. Nor is there any reason to expect that the resolution of the very different question in *Voinovich* will have any bearing on this case. To begin with, of course, the grounds that we raise as a basis for dismissing or affirming appellants' jurisdictional statements have nothing to do with *Voinovich*. There was no issue in that case concerning a contradictory judgment and opinion (*see* pp. 12-14, *supra*); no issue concerning whether a minority group can successfully invoke Section 2 in circumstances

where the numbers indisputably show that they have at least proportional representation in the single-member districts they challenge (*see* pp. 15-23, *supra*); and no issue based on an express factual finding that the State's Plan most fairly balances the competing claims of *two* minority groups (*see* pp. 24-26, *supra;* U.S. App. 66a).

This last point also demonstrates how unrelated *Voinovich* is even to the remedial issue that the United States and the De Grandy appellants have raised. As an initial matter, the question whether it was reversible error for the district court to have failed to hold an evidentiary hearing is clearly not presented in *Voinovich*. Moreover, that case raises no question regarding the effect on one minority group's rights if efforts are made to remedy a violation of another such group's rights. The United States nevertheless attempts to link the two cases by noting that its *Voinovich* amicus brief — and apparently only its brief — discusses "whether the failure to draw an influence district can violate Section 2." U.S. Br. at 18. The United States then argues that, if this Court answers that question in the negative, "it would follow that the district court in this case erred to the extent that it denied relief to Hispanic voters because it might result in the loss of an African-American influence district." *Id.* This logic is both puzzling and inapt.

It is puzzling because even if there is no statutory right to a so-called "influence district" (*i.e.*, a substantial, but less than majority, minority district), it hardly follows that a court can properly remedy a violation against one minority by impairing the interests of another minority, which, according to the United States and the opinion below, has also had its Section 2 rights violated. In any event, labels aside, the fact is that, in this "influence district," African-American voters "*can* elect a candidate of their choice because of strong minority coalitions between African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a (emphasis added). The United States thus cannot finesse the "robbing-Peter-to-pay-Paul" problem here by

intimating that "influence districts" are somehow less valuable or less worthy of protection in Section 2 cases than are majority-minority districts.

In summary, there is no reason for the Court to delay resolution of this case pending the outcome of *Voinovich*. Appellants' appeals should be dismissed or the district court's no-violation judgment should be affirmed on the basis of the merits arguments pressed above. If not, this case should be set for plenary review.[24]

CONCLUSION

The jurisdictional statements of the United States and the De Grandy appellants should be dismissed or, in the alternative, the District Court judgment of no liability should be affirmed.

Respectfully submitted,

JOEL I. KLEIN
PAUL M. SMITH
Klein, Farr, Smith & Taranto
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

STEPHEN N. ZACK
(Counsel of Record)
NORMAN C. POWELL
Zack, Hanzman, Ponce & & Tucker, P.A.
3300 International Place
100 S.E. Second Street
Miami, Florida 33131
(305) 539-8400

---

[24] In an appeal filed on behalf of the Florida House of Representatives in No. 92-519, *Wetherell v. De Grandy*, the House appellants have presented a question (number 4 in their jurisdictional statement), concerning whether "principles of comity and federalism require a federal court to abstain from adjudicating Voting Rights Act claims when the plaintiffs seeking federal court relief have previously raised, and demanded and received adjudication of, identical claims in an ongoing state court proceeding." Although we do not think that this issue presents a ground for summary disposition of the De Grandy and United States appeals, we do wish to preserve the claim if the Court decides to grant plenary review of this case.

Supreme Court, U.S.
FILED
JAN 7 1993
OFFICE OF THE CLERK

Nos. 92-593 and 92-767

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MIGUEL DEGRANDY, *et al.*,
Appellants,
v.
T. K. WETHERELL, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

---

MOTION TO AFFIRM IN PART AND VACATE IN PART

CHARLES G. BURR
(Counsel of Record)
442 W. Kennedy Boulevard
Suite 300
Tampa, Florida 33606
(813) 253-2010

HARRY L. LAMB, JR.
PERRY & LAMB, P.A.
605 E. Robinson Street
Orlando, Florida 32801
(407) 422-5758

DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP SPECIAL CONTRIBUTION FUND
4805 Mount Hope Drive
Baltimore, Maryland 21215
(410) 358-8900
Counsel for Florida State Conference of NAACP Branches

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
STATEMENT OF THE CASE	2
ARGUMENT	7
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:

Barrett v. Varchi, 443 U.S. 55 (1979)	7
Bradford County NAACP v. City of Starke, 712 F. Supp. 1523 (M.D.Fla. 1989)	9
Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C.), *aff'd in part and rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986)	6, 8-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-593

MIGUEL DEGRANDY, *et al.*,
Appellants,

v.

T. K. WETHERELL, *et al.*,
Appellees.

No. 92-767

UNITED STATES OF AMERICA,
Appellant,

v.

STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

---

MOTION TO AFFIRM IN PART AND VACATE IN PART

The Florida State Conference of NAACP Branches and the individual NAACP plaintiffs ("NAACP") move this Court to summarily affirm the three-judge court's liability determination regarding the State's plan for redistricting the Florida Senate, but to summarily vacate the three-judge court's remedy determination and remand the cases for a remedial hearing to determine whether complete relief can be fashioned for the Section 2 violations that have been found to exist.

STATEMENT OF THE CASE

The federal court proceedings to reapportion and redistrict Florida's Senate districts[1] involved three separate suits that eventually were consolidated for trial.

The first suit was filed on January 14, 1992 by Miguel DeGrandy, an Hispanic member of the Florida House of Representatives, and a group of individual Hispanic voters ("the DeGrandy suit"). The DeGrandy suit alleged that the then-existing Senate districts violated Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution by diluting the voting strength of Hispanic voters. Subsequently the DeGrandy suit was amended to seek additional relief under Section 5 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution. On March 27, 1992, a three-judge court was convened to hear the suit.

On April 7, 1992, the Florida State Conference of NAACP Branches and a group of individual African-American voters filed a separate suit challenging the then-existing Senate districts under Section 2 of tha Voting Rights Act and the Fourteenth and the Fifteenth Amendments to the United States Constitution ("the NAACP suit"). On April 9, 1992, the three-judge court ordered the NAACP suit consolidated with the DeGrandy suit.

On April 10, 1992, the Florida legislature adopted Senate Joint Resolution 2-G ("SJR 2-G"). Among other things, SJR 2-G set forth a redistricting plan for the Florida Senate districts.

On June 23, 1992, the United States filed a separate suit alleging that SJR 2-G's redistricting plan for the Florida Senate violated Section 2 of the Voting Rights

[1] The three-judge court also conducted proceedings to reapportion and redistrict Florida's congressional districts and the Florida House of Representatives districts, but those proceedings are not the subject of these appeals.

Act ("the United States' suit"). The United States' suit alleged that SJR 2-G fragmented the Hispanic population in Dade County in such a way that Hispanics would compromise a majority of the voting age population in only three Senate districts. However, according to the suit, if the Senate districts in Dade County were "divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminating plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in one additional . . . district." No vote dilution claim was made by the United States on behalf of African-American voters in the Dade County area. On June 26, 1992, the United States' suit was consolidated with the DeGrandy suit and the NAACP suit.

The trial involving the Florida Senate districts began on June 26, 1992.

During the second day of trial, the NAACP began to introduce evidence through one of its witnesses demonstrating the possibility of creating three Senate districts in the Dade County area in which African-Americans would comprise a majority of the voting age population.[2] The evidence consisted of a redistricting plan created by two members of the Florida House of Representatives, Rep. Peter R. Wallace and Rep. James Burke ("the Burke-Wallace plan"), which had been introduced during the legislative process that ultimately led to the adoption of SJR 2-G. This evidence was offered for the purpose of showing that SJR 2-G diluted the voting strength of

[2] Tr. Vol. III, 111; U.S. App. 87a. (The Jurisdictional Statement filed by the United States in No. 92-767 includes an Appendix that contains relevant portions of trial transcript Vol. III. That Appendix will be referenced herein as "U.S. App." Other relevant portions of the trial transcript found in Vols. IV, VI and VIII, however, are not contained in the Appendix to the United States' Jurisdictional Statement. Those trial transcript references are contained in the Appendix to this motion, and are referenced herein as "App.")

African-Americans in the Dade County area because it created only two Senate districts in which African-Americans constituted a voting age majority, whereas the creation of three such districts was possible.

Counsel for the DeGrandy plaintiffs objected to the introduction of the Burke-Wallace plan on the ground that the NAACP had not officially embraced it as a proposed remedy for the Senate districts in Dade County and, therefore, that the DeGrandy plaintiffs were surprised by the NAACP's evidence.[3] A lengthy colloquy took place between the court and counsel for various parties, including the DeGrandy plaintiffs and the NAACP.[4] At the conclusion of the colloquy, the court refused to admit a copy of the Burke-Wallace plan in evidence and ruled that the NAACP's evidence should be limited to showing that the DeGrandy plaintiffs' and the United States' proposal for the creation of a fourth Hispanic Senate district in Dade County would have a retrogressive effect on the interests of African-American voters. The court added, however, that if it found any violation of Section 2, then the Burke-Wallace plan would be considered as a possible remedy along with all other remedy proposals.[5]

Thereafter, as the trial progressed, several other witnesses testified about various aspects of the Burke-Wallace plan. For example, Dr. Ron Weber ("Weber"), one of the Senate defendants' expert witnesses, testified that the Burke-Wallace plan's three Senate districts in the Dade County area with African-American voting age population majorities were drawn in such a way that they likely would permit African-American voters to elect candidates of their choice from those districts.[6]

---

[3] Tr. Vol. III, 112-13; U.S. App. 88a.

[4] Tr. Vol. III, 113-123; U.S. App. 88a-95a.

[5] Tr. Vol. III, 123-24; U.S. App. 95a-96a.

[6] Tr. Vol. VI, 132-142; App. 10a-17a.

One of the Senate defendants' witnesses was John B. Guthrie ("Guthrie"), the Staff Director of the Senate Committee on Reapportionment. During Guthrie's testimony, he was questioned by the court about the possibility of creating a redistricting plan with four Hispanic and three African-American districts in the Dade County area. The court characterized such a plan as "the ideal solution." Guthrie responded that modern computer technology might permit the districts to be drawn, but he questioned whether the number of voting age Hispanics and African-Americans residing in the districts actually would permit them to elect the minorities' candidates of choice.[7] Counsel for the NAACP also brought to the court's attention the fact that the NAACP's demographers had attempted to create a redistricting plan for Dade, Broward and Palm Beach Counties with four Hispanic and three African-American districts, but that they had been "unable to get the [minority voting age population] percentages of the districts up to a level that I believe the parties will find acceptable."[8]

At the close of the proof dealing with the Senate, the NAACP renewed its motion to have the Burke-Wallace plan admitted into evidence as proof of a Section 2 violation of the voting rights of African-Americans in the Dade County area. Counsel for the NAACP emphasized that the Burke-Wallace plan "is an essential component of the NAACP's [Section 2] case."[9] After hearing objections from several of the other parties, the court ruled that the Burke-Wallace plan would be admitted into evidence.[10]

In closing argument, counsel for the NAACP stated that if it were possible to create a viable redistricting

---

[7] Tr. Vol. IV, 207-15; App. 2a-8a.

[8] Tr. Vol. IV, 216-17; App. 8a-9a.

[9] Tr. Vol. VI, 185; App. 18a.

[10] Tr. Vol. VI, 188; App. 19a.

plan with four Hispanic and three African-American Senate districts in the Dade County area, the NAACP favored such an approach. According to the NAACP's counsel, "[i]f it is possible to accomplish that solution, the NAACP supports that solution. [The] NAACP does not seek to come into this court and advance a claim on behalf of its members at the expense of another minority group." [11] However, absent the demonstrated ability to create such a redistricting plan, the NAACP argued that a preference in the creation of the Senate districts should be given "to the minority group that has demonstrated historically the greatest difficutly in achieving political empowerment in South Florida," namely, African-Americans.[12]

On July 1, 1992, at the conclusion of the Senate portion of the trial, the three-judge court issued its ruling from the bench concerning the Senate redistricting issues. The court ruled that a fourth Hispanic Senate district could be created in the Dade County area consistent with the principles of *Thornburg v. Gingles*, but that the DeGrandy plaintiffs and the United States had failed to prove that the creation of such a district would not have a retrogressive effect on African-American voters in the area.[13]

Immediately thereafter, counsel for the DeGrandy plaintiffs made a motion for reconsideration.[14] Counsel pointed out to the court that one of the DeGrandy experts had succeeded in fashioning a Senate redistricting plan with four Hispanic and three African-American districts in the Dade County area, all of which contained sufficiently large concentrations of minority voting age populations to give minority voters an opportunity to elect

[11] Tr. Vol. VIII, 35-36; App. 22a.

[12] *Id.*

[13] U.S. App. 100a.

[14] U.S. App. 105a.

their candidates of choice. The court was advised that the DeGrandy plaintiffs had intended to proffer the redistricting plan during the remedial phase of the proceedings. The court denied the motion without explanation.[15]

On July 17, 1992, the three-judge court issued a written opinion explaining its bench ruling. The court found that the DeGrandy plaintiffs and the United States had proven that SJR 2-G volated Section 2 by diluting the voting strength of Hispanics in the Dade County area Senate districts. It also found that the NAACP had proven that SJR 2-G violated Section 2 by diluting the voting strength of African-Americans in the Dade County area Senate districts.[16] The court then concluded that the appropriate remedies for these two violations were "mutually exclusive." Accordingly, the court decided to give deference to SJR 2-G as an expression of State policy and to impose that plan "as the remedy in this case." [17]

ARGUMENT

Both the DeGrandy plaintiffs and the United States have argued in their respective appeals that the three-judge court's liability determination under Section 2 should be summarily affirmed, but that the court's remedy determination should be summarily vacated and remanded with instructions to conduct a remedial hearing. The NAACP supports that position.[18]

[15] *Id.*

[16] Significantly, neither the DeGrandy plaintiffs in their appeal (No. 92-593) nor the United States in its appeal (No. 92-767) has challenged this liability determination.

[17] U.S. App. 63a-66a.

[18] Because the NAACP did not file an appeal or cross-appeal, it is mindful that under established precedent it cannot seek an outcome in these appeals that "would result in greater relief than was awarded . . . by the district court," *Barrett v. Varchi*, 443 U.S. 55, 69 n.1 (1979). Nevertheless, the NAACP wishes to advise the Court of its support for the appellants' basic position concerning a remand.

When the NAACP announced to the three-judge court during the Senate redistricting trial that its demographers had attempted unsuccessfully to create a viable Senate redistricting plan with four Hispanic and three African-American districts in the Dade County area, it did not intend to suggest that it possessed the last word on the subject. In fact, the NAACP's counsel explained to the court that the NAACP's efforts to create such a plan had taken place only during the preceding evening, and that approximately ten hours had been devoted to the effort by its demographers.[19] There was testimony from various other witnesses throughout the trial suggesting that far more than ten hours typically is required in order to create a state-wide redistricting plan.

Following the court's bench ruling on July 1, 1992, counsel for the DeGrandy plaintiffs announced to the court that one of the DeGrandy experts had succeeded in creating a viable district configuration in the Dade County area with four Hispanic and three African-American districts. That is the same district configuration which the court earlier had characterized as "the ideal solution." Without explanation from the court, the DeGrandy plaintiffs were denied the opportunity to demonstrate during a remedial hearing how their proposed redistricting plan might resolve the court's expressed concern about retrogression. Likewise, the other parties, including the NAACP, were denied the opportunity to fully examine the DeGrandy plaintiffs' proposed redistricting plan and to determine whether it offered an appropriate remedy for the dilution of the voting strength of African-Americans in the Dade County area.

Federal district courts traditionally have conducted bifurcated proceedings in Section 2 cases, with the first phase focused on liability and the second phase focused on remedy. *See, e.g., Gingles v. Edmisten*, 590 F. Supp.

[19] Tr. Vol. IV, 216-17; App. 9a.

345 (E.D.N.C.), *aff'd in part and rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523, 1526 (M.D. Fla. 1989). This procedure has the obvious advantage of avoiding rushed judgments based on inadequate information. Regrettably, just such a rushed judgment led the three-judge court in these cases to conclude—perhaps prematurely—that it was not possible to create a viable Senate redistricting plan for the Dade County area with four Hispanic and three African-American districts.

If these cases are remanded for a remedial hearing, it might be shown that the DeGrandy plaintiffs' redistricting plan or some other plan is capable of providing complete relief for the two Section 2 violations that have been found to exist. On the other hand, it might be shown that the intricate demographics of the Dade County area simply will not permit the fashioning of such an "ideal remedy." Justice requires, however, that the parties be given an opportunity to try.

CONCLUSION

The three-judge court's liability determination regarding the State's plan for redistricting the Florida Senate should be summarily affirmed. The three-judge court's remedial order should be summarily vacated, and the cases remanded for a remedial hearing to determine whether complete relief can be fashioned for the statutory violations that have been found to exist.

Respectfully submitted,

CHARLES G. BURR
(Counsel of Record)
442 W. Kennedy Boulevard
Suite 300
Tampa, Florida 33606
(813) 253-2010

HARRY L. LAMB, JR.
PERRY & LAMB, P.A.
605 E. Robinson Street
Orlando, Florida 32801
(407) 422-5758

DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP SPECIAL CONTRIBUTION FUND
4805 Mount Hope Drive
Baltimore, Maryland 21215
(410) 358-8900

Counsel for Florida State Conference of NAACP Branches

January 1993

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 92-40015-WS

MIGUEL DEGRANDY, *et al.*,
Plaintiffs,

and

GWEN HUMPHREY, *et al.*,
Plaintiffs-Intervenors,

vs.

WILLIAM P. BARR, as Attorney General of the United States of America,
Third-Party Defendant.

TCA 92-40131-WS

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,
Plaintiffs,

vs.

LAWTON CHILES,
in his official capacity, *et al.*,
Defendants.

TCA 92-40220

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF FLORIDA, *et al.*,
Defendants.

VOLUME IV

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on to be heard before the Honorable JOSEPH W. HATCHETT, United States Circuit Judge; WILLIAM STAFFORD, Chief United States District Judge; and ROGER VINSON, United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 29th day of June, 1992.

* * * *

[207] BY MR. HEBERT:

Q How long would it take, based on your experience, I think you said three thousand plans were drawn on the computers for the Senate?

A Yes. You want to start in Fort Lauderdale and include all of Dade and Monroe?

Q No, I didn't say anything about starting anywhere, Mr. Gutherie. I was asking you how long it would take, using Fort Lauderdale as your starting point in Florida and taking every area south of that, including that area. If you were told by the Court draw four Hispanic VAP majority districts and three African-American majority VAP districts, how long on your computer would it take you and your Senate staff to do that?

A The first thing I would advise the Court is that it may be impossible to accomplish that task in any amount of time.

Q How long would it take you to find out whether it was possible or impossible? How long would it take you to generate [208] the maps and the statistics?

A Addressing—that's a—I don't know. I honestly don't know.

Q Well, we'll try it this way. During the course of the legislative session or any time in 1992, did any legislator ever come to you and say, "Can you see whether or

not this district can be revised"? Did that ever happen once?

A I—it may have. I don't recall it.

Q. What about on the last night of the session, did that ever happen on the last night?

A We did have a last night of the session; yes, sir.

Q Did that happen where people came to you and said, "Gee, we need to make some changes in the map. Show us what this looks like real quick, get on the computer and redraw the lines"? Is it your testimony here to this Court that that never happened in your offices?

A The last week in fact of the legislative session, as you might suppose, was a fairly hectic period. And, yes, there were numbers of people in our office.

Q Numbers of people in your office?

A Including legislators, including the media, including—we have public access terminal. The public was using the computers right up to the very end. We have our minority work stations. And, in fact, the minority members of the legislator—

[209] JUDGE STAFFORD: You're talking about Republicans, not racial minorities?

THE WITNESS: That's correct; although I know that Senator Girardeau was up there much of the time.

Was I ever asked by a member of the Senate or member of the legislature to do "what if" scenarios? Yes, I was asked to do that.

BY MR. HEBERT:

Q. Now, what was the shortest amount of time, the shortest amount of time it ever took you to respond to one of those "what if" questions.

MR. ZACK: Objection, Your Honor. What if what? What if the sky is going to fall down in the next minute and a half, hopefully a second and a half?

MR. HEBERT: I was trying to use his term.

JUDGE HATCHETT: Overruled.

THE WITNESS: Okay. I can't recall what the easiest "what if" postulate that was ever proposed to me was.

JUDGE HATCHETT: That's fine. You've answered the question.

THE WITNESS: Yes.

I can say that the issue of is it possible to draw four Hispanic VAP majority and three African-American VAP majority districts in South Florida, that is a very difficult question. It's a difficult "what if" postulate because of the [210] complexity of the demography of South Florida. It's not something that I can sit here and just opine. It's something, frankly, that I have given some thought to. And my—I don't have a sense of it at all. My expectation is that it would be very difficult to do that.

JUDGE VINSON: Mr. Gutherie, I'm inferring from your answer that the answer is no within the bounds of reasonable expectations of districts? Is that a fair inference to draw from what you're saying?

THE WITNESS: What I have done, Judge Vinson, from the plans that have been placed before the legislature—and many people have been working on these plans for many months now. And I've got to believe—with several different theories about what we ought to accomplish in redistricting.

And the plans that are before the Court, I think they're responsive to say that that's the best we have got along the way. And nobody yet has accomplished that. Okay. Nobody yet has proposed a plan which has four majority African-American—four majority Hispanic-American VAP districts which they believe—which, and, again, normally map makers are shooting for a super majority VAP with the Hispanic districts and three African-American VAP districts in South Florida.

JUDGE VINSON: Have you tried to do it?

THE WITNESS: Have I tried to do it? No.

[211] JUDGE VINSON: Okay.

JUDGE STAFFORD: Mr. Hebert, let me ask you: Does that question presuppose a ten-percent deviation or are you back to his confine of .4 percent?

MR. HEBERT: I haven't actually focused on the deviation. And the question really could have taken into account either scenario. And maybe I should amend my question and say—if we were to—and I think it's a proper--perhaps he's limiting himself because of the .4 percent instead of being willing to enlarge that.

BY MR. HEBERT:

Q Would your answer make a difference if the deviation were permitted to be as high as eight or nine percent?

A It's an empirical question. And I'm relucant to guess as to what the answer is.

Q And how many hundreds of hours did you say that you worked on the computers?

All right. Let me see if I can make the question a little easier for you. Again, using the geographical confines of Fort Lauderdale south as the point of reference, how long would it take you, Mr. Gutherie, to draw four Hispanic districts, two black voting age population majority districts, two majority black voting age, four Hispanic population, voting age population, and one what you term black access district? Could that be done faster than drawing three majority black [212] districts? How long would it take you? That's all I'm asking.

A I do not believe that—

Q Assuming it can be done. I'll even concede that. Assuming it's possible to do it, how long does the computer take in your office to draw such a district if this Court orders you to go back to your office and see how long it takes? Give us an estimate of how long that would take you.

A The answer—I think we're trying to make redistricting into a bit easier a process or working on the

computers into a bit easier process than I in fact believe it is. Because of the—because the concentrations as indicated by the black and Hispanic maps that we have here, because all of the black citizens or persons don't live within the same area and all of the Hispanic persons don't live in exactly the same area and because when they do live in those areas, in order to avoid getting a very large VAP majority it is necessary to include some outlying areas, what is required oftentimes is actually going in at the block level and making decisions block by block of, okay, how many black persons are in this Census block, how many Hispanic persons are in this Census block. And in terms of the total equation involving three hundred thousand Census blocks, am I going to get a better result if I put this Census block in district A or district B. And the best example is a tract or block which has 40 percent Hispanic VAP.

JUDGE STAFFORD: But all this—

[213] THE WITNESS: Excuse me.

JUDGE STAFFORD: But all of this information is already in your computer; isn't it?

THE WITNESS: It's in the computer.

JUDGE STAFFORD: All you have to do is bring it up?

THE WITNESS: Yes.

BY MR. HEBERT:

Q When was the last time you ever worked on—

JUDGE VINSON: Wait.

MR. HEBERT: I'm sorry.

JUDGE VINSON: I would like to get an answer, though, if you can give it to us: How long would it take?

THE WITNESS: Starting—well, I know that the wish-bone-shaped district in Northeast Florida that was proposed by the Senate and was ultimately adopted by this Court, it's a—or in the Florida plan, the district

which goes from Jacksonville down to Alachua County, in both those instances, literally scores of hours were spent crafting that single district in a way to try to create or maintain an African-American opportunity district.

The problem in Northeast Florida is that the urban—and also in Miami—is that the urban core has not kept pace with the rest of the state in terms of population growth. And so in those districts you could add population and adding populate oftentimes means going outside the urban core. The [214] closer the margins are that you're starting with, the more difficult it is to cross the threshold of a 50.1 or a 65 percent or whatever.

JUDGE VINSON: Answer the question. How long would it take?

THE WITNESS: Starting from scratch, it would be —it would take a very, very long time.

JUDGE VINSON: Eight hours? Sixteen hours? Two hours? One hundred hours? What are we talking about? You're not starting from scratch now. You have got a lot you have already got worked out.

THE WITNESS: The—I would guess that it would take ten to fifteen hours to ascertain within a geographic confine whether it was going to be possible. We do not have a good target here yet. If we're talking majority Hispanic VAP, 50.1 percent Hispanic VAP and 50.1 percent African-American VAP and we want four Hispanic and three African-American district, then the other thing that I would have to have as a starting point is how large an area are we willing to look at. Do we want to limit our focus to only Dade and south Broward County? Do we want to go to Fort Lauderdale? Do we want to go to Brevard County?

JUDGE VINSON: Well, he's already said including Fort Lauderdale, Fort Lauderdale south.

THE WITNESS: Fort Lauderdale south, I do not believe [215] it is impossible, given the rest of time, based on the 1990 Census figures to create two—well—three African-American and four Hispanic VAP's—

JUDGE VINSON: No, he asked you two black districts, one access district, plus four Hispanic districts, all with a VAP majority.

THE WITNESS: Assuming that access is greater than 25 or 30 percent, I don't believe that you can have two black African-American majority, one African-American access and four Hispanic VAP majority districts in that area. I don't believe that it's possible.

MR. BURR: Your Honor, if I could just make a brief statement. I know this is little irregular. And this is information that is not in the witness' knowledge, but I believe the Court obviously is struggling with trying to get to a solution.

JUDGE HATCHETT: Well, we don't ordinarily have people just stand and give speeches. Could you communicate with your co-counsel there and have him put it in some type of a question?

MR. BURR: Yes. I'm trying to assist the Court. I will be happy to be quiet.

JUDGE HATCHETT: Find some other way of doing that rather than simply standing up and testifying.

MR. ZACK: Your Honor, may I make a suggestion?

[216] JUDGE HATCHETT: Yes, Mr. Zack.

MR. ZACK: I don't believe this Court should have a plan that wouldn't have been precleared. In preclearance we were told that 65 percent, 64.3 was the minimum that would be precleared upon a Hispanic seat. For this Court to ask questions of a 51 percent VAP Hispanic seat wasn't even passed preclearance by the Justice Department. I would ask the Court to—in order to help the Court understand what is possible here—to pose the question in terms of electable seats as Gingles requires. I would ask the Court to do that.

JUDGE HATCHETT: We have heard you, Mr. Zack.

MR. ZACK: Thank you, Your Honor.

MR. HEBERT: May I proceed?

JUDGE HATCHETT: Yes, you may.

MR. HEBERT: For the record, Mr. Burr simply wanted to bring to the Court's attention the fact that last night he and his parties drew a plan for the South Florida area that did exactly what I think my question proposed and did it last night.

MR. BURR: Not quite, almost but not quite. We limited it not to Fort Lauderdale south but to the three-county area.

MR. HEBERT: Which is—

JUDGE HATCHETT: Palm Beach, Broward and Dade?

MR. BURR: That is correct, Your Honor. And I have [217] given the results of that effort to Mr. Hebert. And all I can say is that based on our experience it is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable. And that effort took approximately ten hours.

JUDGE HATCHETT: Thank you.

He agrees with you, Mr. Zack.

MR. ZACK: I better sit down.

* * * *

VOLUME VI

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on to be heard before the Honorable JOSEPH W. HATCHETT, United States Circuit Judge; WILLIAM STAFFORD, Chief United States District Judge; and ROGER VINSON, United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 30th day of June, 1992, commencing at 8:16 a.m.

* * * *

[132] CROSS EXAMINATION

BY MR. BURR:

Q Dr. Weber, do you have the basic plan statistics for the Reaves/Brown/Hargrett plan and the De Grandy plan in front of you?

A No, sir, I do not.

Q Dr. Weber, let me pass you a booklet that has Plan 275, the De Grandy plan, and Plan 330, Hargrett/Brown/Reaves. That's the first two tabs. Now, if you would please, just look at the first tab, I believe, which is the Hargrett/Brown/Reaves plan, and tell me in that plan how many black majority VAP districts there are that fall within Dade and/or Broward Counties?

A We're looking at the Hargrett/Reaves/Brown?

Q Yes, Hargrett/Reaves/Brown, the two majority black VAP districts?

MR. HEBERT: Could we have identified what document counsel has provided to the witness?

MR. BURR: It is a compilation of the plans, which is already a part of the record. I'm sorry, if I could give you the identifying exhibit number, we could pull it from the Court records, but it's the basic plan stats. Do you [133] have the plan stats for Hargrett/Brown/Reaves in front of you?

A Yes, I do.

Q Could you look at the South Florida districts and tell me of the two black majority VAP districts, what actually is the black VAP?

A In District 36, the yellow district on the map, which goes from Opa Locka to Homestead, that is 59.7 percent VAP, let me just check the numbers just to be sure nobody copied this wrong. I'm relying on something else that somebody wrote here. Yes, 59.7 percent, African American VAP.

Q And in the second district, that is the second black majority district?

A Second African American district, which begins in north Dade and then goes on up into Fort Lauderdale.

Q Yes.

A That is 58.8 percent.

Q 58.8, and what is that district number?

A That's District 32.

Q Okay, now, if you will refer under the next tab to the De Grandy plan and tell me the comparable black VAPs in those two black districts?

A I think they use the same numbers the—could I move that so the Court can see what I'm talking about? (Pause) I always like pictures.

[134] Q If you would just double check under the second tab where you have the planned stats in front of you on the De Grandy plan and confirm for me if you will that the black voting age—

A Yes, in District 36, which is the yellow district, somewhat differently configured than in the Hargrett/Reaves/Brown plan, the number is 57.3 African American VAP.

Q 57.3?

A Yes. And then in the second—what's different about that district, while I'm talking about that, is that that district goes a little further north than the comparable district. It has—the comparable District 32 in Plan 275, which is De Grandy, is 57.1 percent African American VAP, but two-thirds of that district is in Broward rather than in Dade. It's closer to 50/50.

Q If I understand your testimony, under Reaves/Brown/Hargrett, we have 59.7 and 58.8, and under De Grandy we have 57.3 and 57.1?

A Yes, sir, that's correct.

Q Now, do you have an opinion about whether or not those percentages exceed the percentages that are actually needed in order for blacks to elect candidates of their choice from those two districts?

MR. HEBERT: Object on the grounds that it goes [135] beyond the scope of direct examination. This witness was not asked about the election abilities of black voters on direct.

JUDGE HATCHETT: Objection overruled, but you'll be given a chance to cross again.

THE WITNESS: The answer is yes, I have an opinion.

BY MR. BURR:

Q You do have an opinion? What is your opinion on that particular point?

A I have analyzed the turnout for those particular districts, what was the turnout on election day. Okay, for those districts. It is my opinion, based upon that analysis of turnout, the same kind of analysis I did for the Hispanic districts, that those districts are designed—and I'm sorry to use these words, and they may be offensive to some people in the courtroom, but they're designed to waste African American votes.

Q Is that the phenomenon that is known in the—this area of the law as "packing"?

A Yes, sir, they are, they're packed, and there are more African Americans than are necessary to provide a realistic opportunity for African Americans to elect candidates of choice.

Q Do you have an opinion about whether or not this packing [136] phenomenon has an impact on the ability to draw a third district in the South Florida area with a black majority voting age population?

A I believe what I've seen in the two plans, if you go further north from Fort Lauderdale, that neither of them have a VAP majority district that's African American. And furthermore, I did tests of, again, turnout tests for those particular districts, just to see how they would work, and they fail miserably in terms of their ability to put African Americans in control on the general election day.

Q So if I understand you, you believe that the packing of the Districts 32 and 36 does in fact have a negative influence on the ability to create an additional majority seat just to the north?

A That's right, and that's why I said this morning on my direct testimony that I thought what I saw in the attempts to create four Hispanic VAP majority districts in Dade County had a decimating effect on African American voting age population in South Florida.

Q Now, I would like to pass you NAACP's Exhibit No. 1 and ask you some questions about it.

MR. GERBER: May I see that? Is that the exhibit you proffered?

MR. BURR: Yes, and provided you copies.

MR. GERBER: Your Honor, there were objections [137] sustained to the introduction into the record of that plan.

JUDGE HATCHETT: I don't think it has to be in evidence for him to be questioned about it.

MR. BURR: Your Honor, may I show this to the witness?

JUDGE HATCHETT: Yes, yes.

MR. GERBER: Your Honor, I'm going to object to allowing the witness to see that. If it's not in evidence then it's hearsay, if he reads off that document. He cannot do that.

JUDGE HATCHETT: Objection overruled. Let's see where he's going.

BY MR. BURR:

Q Dr. Weber, I would like for you to focus your attention on the document that I have just handed to you, which is NAACP Exhibit 1, to Districts 35, 37 and 39, and I would like to ask you some questions about the reconstituted election statistics in those three districts, 35, 37 and 39.

A This is a House Report Format.

Q I'm sorry?

A This is called the House Report Format so everyone knows what I'm reading from. And I say this because the—there are slight differences in methodology of what reconstitution—

[138] JUDGE HATCHETT: Hold just a minute. Are you simply—what are you attempting to do with this document?

MR. BURR: I'm attempting to have Dr. Weber offer an opinion, if he can, about whether or not the three black majority voting age population districts that are possible to be created in the South Florida districts—South Florida area, are effective in that they in fact would allow blacks to elect candidates of their choice.

MR. GREGORY: Your Honor, we would renew and reaffirm the objection we made—

JUDGE HATCHETT: We haven't asked for argument.

MR. RUMBERGER: Renew our objection. (Pause)

JUDGE HATCHETT: The Court has a couple of questions. Dr. Weber, have you seen this document before—before it was handed to you today?

THE WITNESS: I don't believe so.

JUDGE HATCHETT: So obviously you have not had any opportunity to analyze it, have you?

THE WITNESS: While you were conferring I looked at some numbers. I got to be honest with you, Your Honor, about that.

MR. BURR: There's been testimony, previously.

JUDGE HATCHETT: Here's our ruling and you can decide how you want to do it. If you're simply going to ask this witness to publish what's in that document, the Court [139] is going to rule against you. If you're going to do something more than that, something that he has gained as a result of looking at and observing that document, then questioning along that line may be proper. But if you're simply going to have to have him state what's in the document, then we will entertain objections.

MR. BURR: Thank you, Your Honor, I will proceed as you have directed.

BY MR. BURR:

Q Now, Dr. Weber, what I would like for you to do is look at four election contests reflected in that document.

A Yes, sir.

Q That is the Martinez/Chiles race, the Mack/Mackay race, the Alcee Hastings runoff election and the Leander Shaw retention election. I would like for you to focus on those four results for the three districts that I have indicated to you, that is 35, 37, 39.

A I guess I need to get some additional ground rules established.

JUDGE HATCHETT: Go on and answer it anyway you want and ground rules will be formed as—

BY MR. BURR:

Q Have you had a chance to look at the results?

A I looked at the results, but I think I always need to look at the map because I don't know precisely where these [140] districts are.

Q You will find the maps on the front of the document that I've given you.

A I know they're in South Florida. I know that, but the numbers.

Q The maps are on the front of the document?

A I need to see where they go and what other voters they involve in order to answer questions.

A Okay. I'm ready to answer.

Q Now based on your review of the maps and your review of the reconstituted election returns, do you have an opinion about whether or not those three districts would allow blacks to elect candidates of their choice?

A Yes.

Q What is that opinion?

MR. GERBER: Objection, Your Honor, lack of predicate.

JUDGE HATCHETT: Objection overruled.

BY MR. BURR:

Q What is your opinion?

A What I would like to do is bifurcate my answer. First step you've got to look at the Hastings results for the purposes of determining whether or not African American voters would have an opportunity to nominate in the Democratic primary a candidate of choice, and I think that's [141] the value of Hastings numbers. And I think what they're very valuable for in this particular case is that was not the most favorable circumstances of an election to achieve white crossover in the Democratic primary because of former Judge Hastings' problems with the U.S. Senate. So I would use them for that purpose, okay? And on the basis of what this reconstituted election data shows, I wouldn't have any doubt that in any of these districts the African American voters would be able to control the Democratic primary and to nominate their candidate of choice, and probably little or no white crossover in order to accomplish it.

Q Thank you.

A I got to go to the general election now, next step, to elect, now, okay?

Q Uh-huh.

A What I'm trying to argue is that Hastings doesn't tell us whether anyone can elect a candidate of choice.

You've got to look at general election data to do that. Okay? And in that case, looking at Chiles and Mack's performance in these reconstituted elections, Chiles in '90 and Mack in '88, I have no doubt about District 37 and 39. I think they would elect a candidate of choice and I know that—I think just from looking at the map of District 37. it includes the—I think the parts of Broward County that would be—that have shown in the past support for African [142] American candidates and they've not been able to nominate and elect their candidates in that area.

I think I would be a little more conservative about my opinion in District 35 because it involves Palm Beach, and I think they would allow the election of a candidate of choice, but I think it would depend very significantly on the degree of cohesiveness on the part the African American community in the election, and also on the turnout. And I think under the circumstances in which the turnout were to be relatively equal, among the groups, particularly nonLatin whites and African Americans, and under the circumstances in which the African American community is cohesive—and they generally are in general elections behind Democratic candidates—then I think they would be able to elect candidates of choice for the district, yes.

Q It is an unqualified yes with respect to Districts 37 and 39 and a qualified yes with respect to District 35?

A Yes, that's a very nice way to summarize it.

* * * *

[185] JUDGE HATCHETT: All right. Anything further on the Senate side?

MR. BURR: Yes, Your Honor.

At the commencement of the portion of the trial having to do with the Senate case we moved into evidence, proffered NAACP Exhibit 1, and at that point it was not made, it was made a part of the record but not received in evidence.

At this point Mr. Guthrie has testified about it. NAACP Exhibit 1 has referenced it. I believe Representative Logan has testified about it, certainly the last witness has now testified about it and explained it, and it is an essential component of the NAACP's case.

I would not, if this case goes up on appeal, I [186] want it to be clear what the NAACP's case consisted of, and we are left with a lot of testimony about a document that is the heart, as a matter of fact it is the only part of our case that is not formally received in evidence, and I would proffer it at this point and ask that it be received.

JUDGE HATCHETT: One minute.

MR. BURR: It is the NAACP's Section 2 case.

JUDGE STAFFORD: What is that exhibit?

MR. BURR: That is the, it is the Burke-Wallace plan for the Senate.

JUDGE HATCHETT: You may have very short argument on this matter. We are—

MR. BURR: Well—

JUDGE HATCHETT: Not you, Mr. Burr, the people I assume who are going to—(laughter)—people I assume who are going to object to it. I assume you are going to object?

MR. GREGORY: Mine is very brief, Your Honor. My recollection was this Court ruled that should we get to remedial stage that you would then consider the plan if necessary, but other than that the Court was going to deny it being introduced into evidence.

I don't see that there is any prejudice because if we don't get to remedial stage, it's academic if we [187] do, it might be considered at that point, so I would ask the Court merely to reaffirm its earlier ruling.

JUDGE HATCHETT: Mr. Cardenas?

MR. CARDENAS: Yes, Your Honor, I would certainly agree with counsel. Our spirit is that all doors are open at the remedial stage, but bear in mind our objection for it to be submitted into evidence at this point stems from two reasons.

One, the issue that was covered at the very outset by Your Honors in terms of the fairness or the timeliness of the document. The other and most prevailing argument was while counsel decided on his, to propose his or agree with the motion for a directed verdict against the plaintiffs in the case, at that point in time something happened in my opinion which in essence makes this document not introducible by plaintiffs in this case since we are dealing with the State Senate, and there has been a motion for a directed verdict made by the NAACP in the matter, and from those, from those grounds primarily we would object to its submittal now.

As we said, we certainly agree that if we get to a remedial stage there, their input is very valuable, and we would agree with that, but certainly at this stage it doesn't make any sense.

[188] MR. BURR: May I respond briefly?

JUDGE HATCHETT: We don't need any response.

MR. BURR: Okay.

JUDGE HATCHETT: Government—NAACP Exhibit 1 will be admitted into evidence.

(Whereupon, the aforementioned document was received in evidence as NAACP Exhibit Number 1.)

• • • •

VOLUME VIII

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on to be heard before the Honorable JOSEPH W. HATCHETT, United States Circuit Judge; WILLIAM STAFFORD, Chief United States District Judge; and ROGER VINSON, United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 1st day of July, 1992.

* * * *

[33] MR. BURR: May it please the Court. The NAACP has appeared before this Court over the past five days to present two challenges to the Florida plan under the United States Constitution and the Voting Rights Act, one having to do with the House district in Escambia County and the second challenge being to the Florida plan's Senate districts in South Florida that have the effect of diluting the voting strength of blacks. And I emphasize the word "blacks" as opposed to Hispanics in the South Florida area.

Given what we have been through for the past five days and the record that has developed here, I submit to you that the record is absolutely crystal clear that a Section 2 violation exists with respect to blacks in South Florida. And not only is that Section 2 violation manifestly clear from the record itself, but I submit to Your Honor that the case that has been made out under Section 2 with respect to the Senate districts in South Florida is completely unrebutted. No attorney for either party on either side of this room has come forward in an effort to challenge the evidence that has been proffered to the Court by the NAACP with respect to the Senate plan.

What then exactly is the evidence that comprises the NAACP's Section 2 case in South Florida? What are the elements of a Gingles analysis that we believe the record reflects here? First of all, Mr. Gutherie [34] testified that blacks are sufficiently numerous and geo-

graphically compact to permit the drawing of three black majority VAP districts in South Florida. That testimony is in Volume 4, Pages 200 to 202.

Mr. Burke, Representative Burke, came in here this morning and corroborated that testimony. And if that's not enough, NAACP Exhibit No. 1 demonstrates in very graphic form that it is possible to draw three majority black districts. So, I submit to Your Honor that that makes out the element of the first prong under Gingles.

Secondly, Dr. Lichtman testified that blacks in Dade County and the surrounding areas are politically cohesive and, in his words, that they unite in large numbers behind candidates of their choice. That testimony is in Volume 3, Page 35. And if that testimony in and of itself is not sufficient, the evidence in the Congressional phase of this hearing is replete with similar types of testimony not only as to Dade County but the surrounding areas in South Florida. And I submit to Your Honor that that establishes the second prong of the Gingles test.

Thirdly, Dr. Lichtman testified that a pattern exists in South Florida of Hispanics and whites combining their political strength to defeat the election of candidates of blacks' choice. And, there again, if the testimony of Dr. Lichtman standing alone is not sufficient [35] to establish that point, I submit to Your Honor that that is the very essence of what the case of Meek versus Metropolitan Dade County was all about, an 11th Circuit Opinion. And this Court can certainly take judicial notice of the District Court's record in the Meek case that establishes that point abundantly.

Faced with this record, the NAACP believes that it is incumbent upon this Court to order the creation of three Senate districts in South Florida with a 50 percent or greater black voting age population. In fact, I would submit to Your Honors that Section 2 of the Voting Rights Act requires the creation of just such districts.

Now, the problem for us is that such a remedy presents this Court with a problem, with a dilemma, because His-

panics may—I don't know; I am not casting a value judgment on that—but certainly the Hispanics may have their own separate and independent viable Section 2 claim.

Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. If it is possible to accomplish that solution, the NAACP supports that solution. NAACP does not seek to come into this Court and [36] advance a claim on behalf of its members at the expense of another minority group.

As I made an announcement to this Court several days ago, the NAACP has drawn a fourth replan and if the parties are ordered to submit proposed remedies to this Court, that will in fact be the NAACP's preferred remedy that will be proffered to this Court. Whether or not anybody can agree on it or buy off on it is another question, but that is the NAACP's preferred remedy.

On the other hand, what happens if this Court untimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And I submit to Your Honor that the record is clear that that is African-Americans.

* * * *

No. 92-593

Supreme Court, U.S.
FILED
APR 21 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1992

MIGUEL DE GRANDY, et al.,
Appellants,

v.

T. K. WETHERELL, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

APPELLANTS' BRIEF

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
PATTON, BOGGS
& BLOW
P. O. Drawer 20004
Greensboro, NC 27420
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
RUMBERGER, KIRK
& CALDWELL
P. O. Box 10507
Tallahassee, FL 32302
(904) 222-6550

Alberto R. Cardenas
FERRELL, CARDENAS, FERTEL
& MORALES
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
*Counsel of Record

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTIONS PRESENTED

I. Upon a finding of a violation of Section 2 of the Voting Rights Act, can a district court decline to provide for a complete remedy of that violation?

II. Upon establishing liability under Section 2 of the Voting Rights Act, what remedial procedure and standards should a district court employ to insure Fourteenth and Fifteenth Amendment guarantees are not eviscerated by deference to state redistricting policies?

LIST OF PARTIES

The appellants are: Miguel De Grandy, Mario Diaz-Balart, Andy Ireland, Casimer Smericki, Van B. Poole, Terry Ketchel, Roberto Casas, Rodolfo Garcia, Jr., Luis Rojas, Lincoln Diaz-Balart, Javier Souto, Justo Luis Poso, Alberto Cardenas, Rey Velazquez, Luis Morse, Alberto Gutman, Karen E. Butler, Sgt. Augusta Carter, Jean Van Meter, Anna M. Pinellas, Robert Woody, Gina Hahn, Bill Petersen, Terry Kester, Margie Kincaid, and Brooks White. The appellees are: T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Gwen Margolis, in her official capacity as President of the Florida Senate, Lawton Chiles, in his official capacity as Governor of the State of Florida, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee, Jim Smith, in his official capacity as Secretary of State of Florida and Robert Butterworth, in his official capacity as Attorney General of Florida.

In the consolidated case of Florida State Conference of NAACP Branches, et al. v. Chiles, No. 92-40131-WS, the plaintiffs were: Florida State Conference of NAACP Branches, T.H. Poole, Sr., Whitfield Jenkins, Leon W. Russell, Willye Dennis, Turner Clayton, Rufus Brooks, Victor Hart, Kerna Iles, Roosevelt Walters, Johnnie McMillian, Phyllis Berry, Mary A. Pearson, Mable Butler, Iris Wilson, Jeff Whigham, Al Davis, Peggy Demon, Carlton Moore, Richard Powell, Neil Adams, Leslie McDermott, Robert Saunders, Sr., Irv Minney, Ada Moore, Anita Davis, and Calvin Barnes. The defendants were: Lawton Chiles, in his official capacity as Governor of Florida, Jim Smith, in his official capacity as Secretary

of State of Florida, Robert Butterworth, in his official capacity as Attorney General of Florida, Gwen Margolis, in her official capacity as President of the Florida Senate, T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, and Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee.

In the consolidated case of United States v. Florida, No. 92-40220-WS, the plaintiff was the United States of America, and the defendants were: State of Florida, T.K. Wetherell, Speaker of the Florida House of Representatives; Gwen Margolis, President of the Florida Senate; Lawton Chiles, Governor of the State of Florida; Robert Butterworth, Attorney General for the State of Florida; Peter R. Wallace, Chairman of the House Reapportionment Committee; Jack Gordon, Chairman of the Senate Reapportionment Committee; and Jim Smith, Secretary of State for the State of Florida.

The court below also granted the following persons and organizations leave to intervene or act as amicus curiae: Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; the Cuban American Bar Association; the Coalition of Hispanic Women; and Daniel Webster. Plaintiff-intervenors include Gwen Humphrey, Vivian Kelly, Gene Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. William; State Representatives Darryl Reaves, Corinne Brown and James T. Hargrett; United States Representative Jim Bacchus; and

United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

Cross appeals have been filed by the following parties: T.K. Wetherell, Peter R. Wallace, Lawton Chiles, Jim Smith, Robert Butterworth, the State of Florida (92-519) and the United States of America (92-767). These appeals have been consolidated with this case by order of this Court dated February 22, 1993.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. Pre-Trial Proceedings.	2
II. Trial Proceedings In The District Court.	8
SUMMARY OF ARGUMENT	13
ARGUMENT	15
III. UPON A FINDING OF A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT, A DISTRICT COURT MUST RENDER A COMPLETE REMEDY, PURSUANT TO THE REMEDIAL PROCEDURES AND STANDARDS ESTABLISHED BY THIS COURT TO ENSURE THAT FOURTEENTH AND FIFTEENTH AMENDMENT GUARANTEES ARE NOT EVISCERATED.	15
A. The equitable duty of a district court to provide a complete remedy for a violation of the Voting Rights Act is	

explicit in this Court's holdings, which have been codified in amended Section 2. 16

B. This Court has established a remedial procedure for district courts to employ upon a finding of a Section 2 violation. 22

C. This Court has developed judicially manageable standards by which the completeness of Section 2 remedies can be measured. 26

IV. THE DISTRICT COURT'S ABDICATION OF ITS REMEDIAL RESPONSIBILITY LED IT TO ADOPT AN ILLEGAL, DISCRIMINATORY STATE PLAN AND IGNORE THE FEASIBILITY OF AN "IDEAL REMEDY." 29

A. The district court's deference to the state plan that violated Section 2 of the Voting Rights Act was an error of law. 29

B. The District Court placed a novel burden of proof upon the appellants, which is not required by the Voting Rights Act. 33

C. There is no proper record evidence to support the District Court's conclusion that its "ideal" remedy -- the

elimination of all dilution of both the Hispanic and African-American communities -- was not possible. 34

D. The De Grandy Appellants presented a plan that provided a complete remedy. 39

CONCLUSION 40

TABLE OF AUTHORITIES

Page

Cases

Arizonans for Fair Representation v. Symington,
No. Civ. 92-256-PHX-SMM
(D. Ariz. April 30, 1992) 28

Chapman v. Meier,
420 U.S. 1 (1975) 19

Connor v. Finch,
431 U.S. 407 (1977) 19, 26, 29

DeBaca v. County of San Diego,
794 F. Supp. 990 (S.D. Cal. 1992) 32

Dillard v. Crenshaw County,
831 F.2d 246 (11th Cir. 1987) 18

Edge v. Sumter County School District,
775 F.2d 1509 (11th Cir. 1985) 18

Gingles v. Edmisten,
590 F. Supp. 345 (E.D.N.C. 1984),
aff'd in part and reversed in part
sub nom., Thornburg v. Gingles,
478 U.S. 30 (1986) 18, 19, 23, 24

Good v. Austin,
800 F. Supp. 557 (E. & W.D. Mich. 1992) . 28

Green v. County School Bd.,
391 U.S. 430 (1968) 17

Growe v. Emison,
___ U.S. ___, No. 91-1420
(February 23, 1993) (WESTLAW
42842 (U.S.Minn.)) 15, 18, 20, 27

Hastert v. State Bd. of Elections,
777 F. Supp. 634 (N.D. Ill. 1991) 28

In re Constitutionality of Senate Joint
Resolution 2-G Special
Apportionment Session 1992,
597 So. 2d 276 (Fla. 1992) 6, 8, 26

In re Illinois Congressional Districts
Reapportionment Cases,
No. 81 C 1395, slip op. (N.D. Ill.
1981), aff'd mem sub nom.,
Ryan v. Otto, 454 U.S. 1130,
102 S. Ct. 985, 71 L. Ed. 2d 284
(1982) 17, 19

Kilgarlin v. Martin,
252 F. Supp. 404 (S.D. Tex. 1966),
rev'd in part and remanded sub nom.,
Kilgarlin v. Hill, 386 U.S. 120
(1967) 3

Kirksey v. Board of Supervisors,
554 F.2d 139 (5th Cir.) (en banc),
cert. denied, 434 U.S. 968 (1977) 17, 20

Louisiana v. United States,
380 U.S. 145 (1965) 16, 17

McGhee v. Granville County,
860 F.2d 110 (4th Cir. 1988) 18

Meek v. Metropolitan Dade County,
805 F. Supp. 958 (S.D. Fla. 1992) 24

Meek v. Metropolitan Dade County,
908 F.2d 1540 (11th Cir. 1990) 20

North Carolina State Bd. of
Educ. v. Swann,
402 U.S. 42 (1971) 17

Reynolds v. Sims,
377 U.S. 533 (1964) 22

Roman v. Sincock,
377 U.S. 695 (1964) 19, 28

Rybicki v. State Board of Elections,
574 F. Supp. 1082 (N.D. Ill. 1982) 20

Shaw v. Barr,
808 F. Supp. 461 (E.D.N.C. 1992),
appeal pending as Shaw v. Reno,
No. 92-357 15

Thornburg v. Gingles,
478 U.S. 30 (1986) . . . . . passim

United States v. Dallas County Commission,
850 F.2d 1433 (11th Cir. 1988) 18, 21

United States v. Florida, et al.,
TCA 92-40220-WS 7

Upham v. Seamon,
456 U.S. 37 (1982) 30

Voinovich v. Quilter,
61 U.S.L.W. 4199 (U.S. March 2,
1993) (No. 91-1618) 15, 18, 20, 27

Whitcomb v. Chavis,.
403 U.S. 124 (1971) 27

White v. Weiser,
412 U.S. 783 (1973) 23

Wilson v. Eu,
823 P.2d 545 (Cal. 1992) 27, 28

Wise v. Lipscomb,
437 U.S. 535 (1978) 22

Statutes

28 C.F.R. Part 51 (1991) 6

28 U.S.C. § 2284 4

28 U.S.C. § 1253 2

42 U.S.C. § 1973 . . . . . passim

Article III, Section 16 of the Constitution
of the State of Florida 2, 3, 4, 5

Fed. R. Civ. P. 53 4

Other

S. Rep. 97-417, 97th Cong., 2d Sess. 193 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 208 18

No. 92-593

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

MIGUEL DE GRANDY, et al.

Appellants,

v.

T. K. WETHERELL, et al.

Appellees.

On Appeal From The United States District Court For The Northern District Of Florida Tallahassee Division

APPELLANTS' BRIEF

OPINIONS BELOW

The July 2 judgment and July 17, 1992, opinion of the three-judge court for the Northern District of Florida, Tallahassee Division, which implemented redistricting of the state legislative districts in Florida, are unreported. Each is set out in the Appendix to the Appellants' Jurisdictional Statement (App. 1-92).

JURISDICTION

The judgment of the three-judge court for the Northern District of Florida, Tallahassee Division, was entered on July 2, 1992. Appellants filed notice of appeal on July 31, 1992. See J.S. App. 98.

This appeal was docketed in this Court within 60 days after the filing of the notice of appeal in the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. Probable jurisdiction was noted by this Court on February 22, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case are Article I, Section 2 of, and the First, Thirteenth, Fourteenth and Fifteenth Amendments to, the Constitution of the United States, Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973(c), and Article III, Section 16 of the Constitution of the State of Florida, the pertinent texts of which are set out in the Appendix to the Jurisdictional Statement (App. 93-97).

STATEMENT OF THE CASE

I. Pre-Trial Proceedings.

On January 14, 1992, Miguel De Grandy, an Hispanic member of the Florida House of Representatives, and other registered voters (the "De Grandy Appellants") filed a complaint in the District Court for the Northern District of Florida, Tallahassee Division, challenging the validity of Florida's congressional and state legislative

districts. The De Grandy Appellants alleged that the then-existing districts violated both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 et seq., and further alleged that there was an impasse in the legislative process to adopt remedial districts. The De Grandy Appellants urged the District Court to redistrict and reapportion[1] the state. The District Court, however, declined to take preliminary action, giving the Florida legislature an opportunity to adopt remedial redistricting plans.

Subsequently, the De Grandy Appellants amended their original complaint and alleged specific violations of the Equal Protection Clause (the "one-person, one-vote" principle) and of the Fifteenth Amendment to the United States Constitution.[2] The plaintiffs also alleged violations

---

[1] The term "reapportionment" properly refers to the redistribution of seats in established units of government such as the United States House of Representatives. "Redistricting" signifies line-drawing to establish new districts within these units. Kilgarlin v. Martin, 252 F. Supp. 404, 410 n.1 (S.D. Tex. 1966), rev'd in part and remanded sub nom., Kilgarlin v. Hill, 386 U.S. 120 (1967). Because the Constitution of Florida, Article III, Section 16(a) permits the legislature to change the number (within a range) of House and Senate seats after each decennial census, it is technically appropriate to refer to the Florida redistricting process as "reapportionment." This term is used throughout this Brief for purposes of consistency with the District Court opinion.

[2] The parties stipulated that impermissible population imbalances in the districts existed at the time of the commencement of this action. According to the 1990 census, the total population of the state of Florida was 12,937,926, an increase of 3,213,602 persons since 1980. To achieve equal population districts in the forty-member Senate, each district would ideally contain 323,448 persons. To achieve equal population districts in the one hundred twenty-member House, each

of Sections 2 and 5 of the Voting Rights Act because the districts diluted the voting strength of Hispanic voters. On March 27, 1992, pursuant to 28 U.S.C. § 2284, a three-judge court was convened to hear the challenge.

The Florida legislature began its regular session on January 14, 1992; the session ended on March 13, 1992, without adopting a state reapportionment plan. On March 27, 1992, pursuant to a renewed motion by the De Grandy Appellants, the three-judge panel exercised jurisdiction and issued a scheduling order. See Juris. Statement App. 12. Consequently, on April 2, 1992, the Governor of Florida called a special redistricting and reapportionment session of the Florida legislature pursuant to Article III, § 16(a) of the Florida Constitution.

On April 6, 1992, pursuant to Fed. R. Civ. P. 53, the court appointed United States District Judge C. Clyde Atkins as Special Master for both congressional and legislative reapportionment. On April 7, 1992, the court consolidated this case with a similar lawsuit filed by the Florida State Conference of NAACP Branches (the "NAACP") and individual African-American voters. The court ordered bifurcation of the congressional redistricting and state reapportionment hearings.[3] On April 10, 1992,

---

district would ideally contain 107,816 persons.

[3] Judge Atkins concluded hearings on congressional redistricting and issued his report and recommendation. The district court considered the parties' objections, conducted a hearing and issued its judgment on May 29, 1992. No appeal has been filed with respect to that judgment.

On the basis of the evidence adduced during the congressional hearings, Judge Atkins recommended, and the court below adopted, a

the legislature adopted Senate Joint Resolution 2-G (hereinafter "SJR 2-G") reapportioning state House and Senate districts. Pursuant to Section 5 of the Voting Rights Act, the Attorney General of the State of Florida submitted SJR 2-G to the United States Department of Justice for preclearance.

On April 13, 1992, pursuant to Fla. Const. Art. III, § 16(a), the Attorney General of the State of Florida petitioned the Florida Supreme Court for a declaratory judgment to determine the validity of the apportionment plan.[4] On May 13, 1992, the Florida Supreme Court validated SJR 2-G, subject to the right of any interested party to file a subsequent challenge under Section 2 of the

---

congressional plan that created two Hispanic majority districts (with 67.5% Hispanic voting age population ["HVAP"] and 70.6% HVAP, respectively) and two Black majority districts (with 54.0% Black voting age population ["BVAP"] and 50.6% BVAP, respectively).

[4] Under the Constitution of the State of Florida, if the legislature fails to apportion legislative districts within two years of each federal decennial census, the governor is required to convene a special apportionment session of the legislature, and it is the "mandatory duty" of the legislature to adopt a joint resolution of apportionment. Fla. Const. Art. III, § 16(a). See Juris. Statement App. 106. The constitution further requires the state attorney general to petition the Florida Supreme Court for a declaratory judgment to determine the validity of the apportionment plan. Id.

Under state law, because the proceeding before the Florida Supreme Court is to determine only the facial validity of the apportionment plan, proceedings are conducted on an accelerated schedule without discovery by the parties and without the introduction of evidence. If the Florida Supreme Court determines that the legislative apportionment is facially valid, the plan must be precleared by the Department of Justice pursuant to 42 U.S.C. § 1973(c) (Section 5 of the Voting Rights Act) before it may be implemented.

Voting Rights Act.[5] In re Constitutionality of Senate Joint Resolution 2-G Special Apportionment Session 1992, 597 So. 2d 276 (Fla. 1992). As a result of the facial validation, and pending the Section 5 preclearance process, the district court stayed its proceedings -- including hearings scheduled by the Special Master regarding state reapportionment -- until May 27, 1992. See Juris. Statement App. 13.

On June 16, 1992, the Attorney General of the United States precleared the Florida House of Representatives redistricting plan, but refused to preclear the Senate plan with regard to the Hillsborough County area.[6]

On June 17, 1992, the Florida Supreme Court requested that the legislature adopt a reapportionment plan that would take into consideration the objections of the Justice Department. Its order concluded that: "In the event the Legislature declares its inability to adopt a reapportionment plan or fails to adopt a plan by June 24, 1992, this Court will conclude that a legislative impasse

[5] In carrying out its quasi-legislative function of conducting a facial review of SJR 2-G, the Florida Supreme Court explicitly declined to undertake a complete Section 2 analysis of SJR 2-G, stating, "[i]t is impossible for us to conduct a complete factual analysis contemplated by the Voting Rights Act, as interpreted in Thornburg v. Gingles, within the time constraints of Article III, section 16(c) [of the Florida constitution]." In re Constitutionality of Senate Joint Resolution 2-G, 597 So. 2d at 282 (1992).

[6] Five Florida counties are subject to the preclearance requirements of Section 5: Collier, Hardee, Hendry, Hillsborough and Monroe. See Appendix to 28 C.F.R. Part 51 (1991). The letter of the Attorney General specifically limited its decision to these five counties and did not address Section 2 violations elsewhere in the state. Juris. Statement App. 14

has occurred, and this Court will promptly undertake to make such reapportionment." Juris. Statement App. 16. The federal court continued to stay its hand until the state reapportionment processes was concluded.

On June 18, 1992, Defendant Chiles, the Governor, Defendant Wetherell, Speaker of the House, and Defendant Margolis, President of the Senate, advised the state Supreme Court of their decision not to convene an extraordinary apportionment session of the Florida legislature. See Juris. Statement App. 16-17. On June 19, 1992, the Florida Supreme Court declared a legislative impasse.

On June 23, 1992, the United States filed suit in the court below against the State of Florida alleging that the state's 1992 legislative redistricting plans diluted the voting strength of African-American citizens in Hillsborough County and in Escambia County, and the voting strength of Hispanic citizens in Dade County, all in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, et seq.[7] The district court consolidated the complaint filed by the United States with the previously consolidated cases brought by the De Grandy Appellants and the NAACP. All three cases continued to be stayed pending conclusion of the state reapportionment process.

[7] United States v. Florida, et al., TCA 92-40220-WS.

II. Trial Proceedings In The District Court.

On June 25, 1992, in light of the legislative impasse[8] the Florida Supreme Court adopted a Senate redistricting plan that complied with the Attorney General's objection to Hillsborough County. In re Constitutionality of Senate Joint Resolution 2G Special Apportionment Session 1992, 601 So. 2d 543 (Fla. 1992). This action concluded the facial review by the Florida Supreme Court.

Upon approval of the legislative plans by the Florida Supreme Court, the district court stay was lifted. See Juris. Statement App. 16. The De Grandy Appellants then filed a third amended complaint, alleging that the 1992 apportionment plan (SJR 2-G) violated Section 2 of the Voting Rights Act, specifically with regard to Hispanics in the Dade County districts contained in the Senate and House plan.

On June 26, 1992, the court below began hearing the Section 2 challenges in the consolidated cases,[9] incorporating by reference the evidence that had already been adduced in Judge Atkins's hearings on congressional redistricting. Juris. Statement App. 22. See Tr. I 37.

---

[8] "[W]e believe that it is our obligation to redraw the plan to satisfy the objection of the Justice Department now that the legislature has declared that it is not going to do so." In re Constitutionality of Senate Joint Resolution 2G, 601 So. 2d, at 545.

[9] The court denied the motion of the De Grandy Appellants to limit the scope of its consideration to preliminary relief only. See Juris. Statement App. 13-14.

During the trial, the district court acknowledged that a hearing with regard to an appropriate remedy would follow a determination of liability:

> JUDGE VINSON: If we find there is, in fact, a Section 2 violation, then this [plan] becomes a remedy, among any number of remedies available, upon which the Court can act. I think at that time it would be appropriate for us to consider.
>
> Tr. III 123-124.
>
> JUDGE HATCHETT: And note, however, that Judge Vinson did indicate that in the event a Section 2 violation is found, and this Court is then to the point of giving a remedy, you will be heard on the proper remedy.
>
> Tr. III 126.

After five days of trial, the court found that, in the Dade County area, both the House and Senate plans violated Section 2. The court ruled that, "under the totality of the circumstances, the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County." Juris. Statement App. 28. The court conducted a remedy phase of the case with regard to the House only and adopted as its remedy a

modified version of the House plan presented by the De Grandy Appellants.[10]

The state Senate redistricting plan enacted by the State of Florida (SJR 2-G) created seven Senate districts in the Dade County area, in three of which Hispanics comprise a majority of the voting age population.[11] At trial, the De Grandy Appellants proved that the state's plan fragmented the Hispanic community. The De Grandy Appellants also proved that, if the Dade County area were divided into equally populated Senate districts, which followed non-discriminatory plan-drawing criteria, Hispanics would constitute a voting age majority in one additional Senate district in the Dade County area.[12]

---

[10] These appellants raise no issue for appellate review with respect to the district court's order concerning reapportionment of the Florida House.

[11] In South Florida, SJR 2-G created a total of five minority-majority Senate districts.

Hispanic Majority Districts

District 34 (Dade)	66.3% HVAP
District 37 (Dade)	64.3% HVAP
District 39 (Dade)	76.1% HVAP

Black Majority Districts

District 36 (Dade)	52.5% BVAP
District 30 (Dade, Broward, Palm Beach)	51.7% BVAP

[12] In South Florida, Plan 275, submitted by the De Grandy Appellants, contained four Hispanic voting age population majority districts and two Black voting age population majority districts, with the

In analyzing the evidence presented, the district court applied the three-prong test set out in Thornburg v.

---

following percentages of the voting age population:

Hispanic Majority Districts

District 33 (Dade)	71.5% HVAP
District 34 (Dade)	66.1% HVAP
District 35 (Dade)	55.0% HVAP
District 40 (Dade)	66.2% HVAP

Black Majority Districts

District 32 (Dade, Broward)	57.1% BVAP
District 36 (Dade)	57.3% BVAP

An alternative plan presented by Plaintiff Darryl Reaves, Plan 180, also created four Hispanic VAP supermajority districts (each slightly different from the De Grandy Appellants' plan) in which Hispanics constituted the following percentages of the voting age population:

Hispanic Majority Districts

District 33 (Dade)	66.8% HVAP
District 34 (Dade)	65.0% HVAP
District 35 (Dade)	65.7% HVAP
District 40 (Dade)	62.1% HVAP

Black Majority Districts

District 32 (Dade, Broward)	58.8% BVAP
District 36 (Dade)	59.7% BVAP

See Juris. Statement App. 70.

Gingles, 478 U.S. 30 (1986),[13] as well as the totality of the circumstances analysis cited favorably in Justice O'Connor's concurring opinion in Gingles. The court concluded that the De Grandy Appellants had established a violation of Section 2. Juris. Statement App. 67. As a result, the court stated: "We must now fashion a remedy." Id. (emphasis added). Astonishingly, however, the district court declined to substitute a remedial plan in place of SJR 2-G and, totally contrary to the evidence upon which its finding of a violation was based, stated in its ruling from the bench:

> [T]he plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida. . . . Consequently, under Supreme Court precedent, this court must give deference to the state

[13] The minority group must be able to demonstrate:

1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district;

2) that it is politically cohesive; and

3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances (such as the minority candidate running unopposed), usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 49-50.

> policy as expressed in the Florida plan as validated by the Florida Supreme Court.

Juris. Statement App. 27-28. Immediately after the ruling, the court denied the De Grandy Appellants' motion for reconsideration and refused to consider their evidence of a remedy that would create four Hispanic supermajority districts without any regressive effect on Black voters.[14]

Following the district court's July 2 judgment, the House defendants applied to Justice Kennedy for a stay, pending their filing of a jurisdictional statement. The application was granted on July 17, 1992. See Stay Order, No. A-32. Accordingly, the November 3, 1992, election for Florida state House and state Senate members was held pursuant to SJR 2-G.

SUMMARY OF ARGUMENT

Upon finding violations of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, a district court has an equitable duty to render a complete remedy to cure those violations. This duty is based upon decisions of this Court affording remedies to statutory and constitutional violations, which have been codified in Section 2. In carrying out this duty, a district court should provide both an opportunity to the legislature to remedy the violations

[14] In addition to Plans 275 and 180, see note 12 supra, Plan 345, prepared by the Senate minority staff director for the De Grandy Appellants and submitted to the court in De Grandy's motion for reconsideration, created several additional remedial options for the court, including a plan that would have met the court's "ideal" remedy of four Hispanic minority districts with voting age populations of 65.3%, 64.0%, 60.0% and 69.2% and three Black districts with voting age populations of 52.5%, 55.3% and 52.3%.

identified as well as a hearing to determine whether the legislature's proposal itself completely conforms with federal law.

In the present case, the lower court, a three-judge panel, received extensive evidence of claims brought by a group of Hispanic citizens, by the United States of America and by a group of African-American citizens, that the legislative apportionment plan enacted by the State of Florida ("SJR 2-G") violated Section 2 of the Voting Rights Act. The district court found that violations existed with respect to both the state House and the state Senate reapportionment plans, ruling specifically that "vote dilution exists in Dade County in violation of Section 2 of the Voting Rights Act." The lower court then properly held a remedial proceeding to correct the violations found with respect to the House plan and, accordingly, imposed a remedial plan. The court, however, did not hold any remedial proceeding or consider any further evidence regarding the violations it found in the Senate plan. Instead of following the standard remedial procedures, erroneously imposed a plan previously found to violate federal law.

The lower court reached its erroneous conclusion not to conduct a remedial proceedings by determining, solely on the basis of evidence presented during the liability phase, that remedies for African-Americans and Hispanics were "mutually exclusive." This conclusion was reached despite the Appellants' proffer of a proposed remedial plan ("Plan 345") that created a sufficient number of minority Senate districts (four Hispanic and three African-American districts) to cure the violations identified by the court. The lower court's failure to consider this evidence and its failure to offer the state and the plaintiffs an opportunity to

address the violations constitute reversible error. Consequently, this case should be reversed and remanded to the lower court to conduct a proper remedial procedure. To correct this error, this Court should reverse the judgment below with regard to the Florida Senate and remand the case for further remedial proceedings.

ARGUMENT

III. UPON A FINDING OF A VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT, A DISTRICT COURT MUST RENDER A COMPLETE REMEDY, PURSUANT TO THE REMEDIAL PROCEDURES AND STANDARDS ESTABLISHED BY THIS COURT TO ENSURE THAT FOURTEENTH AND FIFTEENTH AMENDMENT GUARANTEES ARE NOT EVISCERATED.

Both the rulings of this Court and the plain language of the Voting Rights Act ("the Act") and its legislative history require a district court to provide a complete remedy, if it finds a violation of the Act.[15] This Court

---

[15] The issues in this appeal are clearly distinct from other Voting Rights Act cases before the Court this term. Unlike Growe v. Emison, ___ U.S. ___, No. 91-1420 (February 23, 1993) (WESTLAW 42842 (U.S.Minn.)) (hereinafter Growe), the three-judge court here deferred action until the State reapportionment authorities had completed redistricting. Unlike Voinovich v. Quilter, 61 U.S.L.W. 4199 (U.S. March 2, 1993) (hereinafter Voinovich), the court below here affirmatively found a Section 2 violation in which both African-American and Hispanic communities could constitute a majority in additional districts. Unlike Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992), appeal pending as Shaw v. Reno, No. 92-357, no issue has been raised of race-conscious gerrymandering in this case.

has established remedial procedures a lower court must follow when it finds a violation of the Act. A complete remedy has not been achieved if a proven violation that dilutes minority voting strength is allowed to continue to exist.

A. The equitable duty of a district court to provide a complete remedy for a violation of the Voting Rights Act is explicit in this Court's holdings, which have been codified in amended Section 2.

The 1982 amendments to Section 2 of the Voting Rights Act codify the remedial instructions this Court had previously given district courts to apply in fashioning remedies for constitutional violations of voting rights. "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965) (holding that certain voter qualification tests, as applied to minority citizens, violated the Fourteenth and Fifteenth Amendments). The Senate

Report[16] accompanying the 1982 amendments to Section 2 restated this maxim:[17]

> The court should exercise its traditional equitable principles to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

---

[16] This Senate Report has been recognized as an authoritative guide for determining legislative intent. Gingles v. Thornburg, 478 U.S. 30, 42 n.7:

> The United States urges this Court to give little weight to the Senate Report, arguing that it represents a compromise among conflicting "factions," and thus is somehow less authoritative than most Committee Reports. . . . We are not persuaded that the legislative history of amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.

(Citations omitted.)

[17] See also U.S Code Cong. & Ad. News at 209 n.121; Louisiana v. United States, supra; Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977); Green v. County School Bd., 391 U.S. 430 (1968); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 42 (1971); In re Illinois Reapportionment, No. 81-C-3915 (1981), aff'd sub nom., Ryan v. Otto, 454 U.S. 1130 (1982).

S. Rep. 97-417, 97th Cong., 2d Sess. 193 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 208 (emphasis added).[18]

This remedial philosophy -- that "any proposal to remedy a Section 2 violation must itself conform with Section 2" -- has likewise been followed in the Eleventh Circuit where the instant case arose. United States v. Dallas County Commission, 850 F.2d 1433, 1437, (11th Cir. 1988), citing Dillard v. Crenshaw County, 831 F.2d 246, 249 (11th Cir. 1987) and Edge v. Sumter County School District, 775 F.2d 1509 (11th Cir. 1985). Notwithstanding this clear remedial command, some district courts have expressed uncertainty concerning the standard by which a "complete" remedy is to be measured. See, e.g., McGhee v. Granville County, 860 F.2d 110, 118 n.8 (4th Cir. 1988). These uncertainties, however, relate to whether "influence districts" are required to achieve a complete remedy,[19] not to whether, as here, a district court can fail to eradicate proven illegal dilution by

---

[18] Amended Section 2 embodies a congressional purpose to remove all vestiges of minority race vote dilution perpetuated on or after the amendment's effective date by state or local mechanisms. Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), citing S. Rep. 97-417, 97th Cong. 2d Sess. 193 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 177, and H.R. Rep. No. 227, 97th Cong., 1st Sess. 31 (1981).

[19] The treatment of the remnants of the minority community, after the creation of all of the potentially "effective" single-member districts in which statistically significant racial bloc voting is present, remains unresolved. "We have not yet decided whether influence dilution claims . . . are viable under Section 2, Growe, 507 U.S. at ____ n.5; see Gingles, 478 U.S. 30, 46-47 nn.11-12 (leaving open the possibility of influence dilution claims); nor do we decide that question today." Voinovich v. Quilter, supra, at 4202.

ignoring clearly feasible minority/majority districts. The plain meaning of the statute is that, at a minimum, a complete remedy must prohibit the imposition of any practice or procedure found to deny or abridge the right to vote. 42 U.S.C. 1973(a).

In considering judicial remedies in redistricting cases even prior to the 1982 amendments, decisions of this Court recognized that federal courts must meet "higher standards" in adopting redistricting plans than apply to a plan crafted by a legislative body. Chapman v. Meier, 420 U.S. 1, 26 (1975). This higher duty is to insure that a court remedy is "free from any taint of arbitrariness or discrimination," Roman v. Sincock, 377 U.S. 695, 710 (1964), and that it will "allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges." Connor v. Finch, 431 U.S. 407, 425 (1977).

In Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), aff'd in part and reversed in part sub nom., Thornburg v. Gingles, 478 U.S. 30 (1986), a challenge to North Carolina's multimember legislative districts, the district court articulated the legal concept that dilutive voting practices shall not be retained, and cited its jurisprudential lineage:

> Having determined that the present plan violates a secured voting right, our obligation remains, however, to provide affirmative judicial relief if needed to insure compliance by the state with its duty to construct districts that do not dilute the voting strength of the plaintiff class as was here found, or in other ways. See In re: Illinois Congressional Districts Reapportionment Cases, No.

> 81 C 1395, slip op. (N.D. Ill. 1981), aff'd mem sub nom., Ryan v. Otto, 454 U.S. 1130, 102 S. Ct. 985, 71 L. Ed. 2d 284 (1982); Rybicki v. State Board of Elections, 574 F. Supp. 1082 (N.D. Ill. 1982); Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.), cert. denied, 434 U.S. 968, 98 S. Ct. 512, 54 L. Ed. 2d 454 (1977).

Id. at 376.

In a vote dilution case involving multimember districts, a district court measures whether a remedy is complete by dividing the former multimember district(s) into single-member districts, and then analyzing whether the submerged minority population has an "effective voting majority" in whatever number of newly drafted districts are justified by appropriate population criteria. See Thornburg v. Gingles, 478 U.S. 30 at 50 n.17; see also Meek v. Metropolitan Dade County, 908 F.2d 1540, 1547 (11th Cir. 1990). The same standard now applies in challenges to single-member districts as well. Growe, supra; Voinovich, supra. See also Gingles, 478 U.S. 30, 46 n.12.

As this Court pointed out only last month, the illegal practice or procedure found in single-member districting is "fracturing". "The usual device for diluting minority voting power is the manipulation of district lines," so that a politically cohesive minority is divided among various districts so that it is a majority in none. Voinovich, supra, at 4102. The remedial task facing a court in the case of fracturing is as straightforward as the remedial task facing a court in the case of submergence: to draft a plan that eliminates the illegal fracturing by including the minority population in newly-drawn, single-

member districts in which it constitutes a majority. See Gingles, 478 U.S. 30, 50 n.16.

In this case, the district court found a Section 2 violation because of fracturing, but failed to remedy the violation or even to hold a hearing to determine what remedies were available. Because the plain language of the statute and the holdings of this Court make it abundantly clear that a dilutive voting mechanism shall not be imposed,[20] it is error for a district court to maintain a voting mechanism that it has found violates Section 2. See Thornburg v. Gingles, 478 U.S. 30; see also United States v. Dallas County Commission, 850 F.2d 1433. The lower court's order -- permanently mandating election districts found to fracture a compact, cohesive minority group -- does not afford any relief, much less a complete remedy. This error of law compels reversal.[21]

---

[20] Section 2 provides in part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. § 1973(a).

[21] Moreover, the failure of the court to fashion a complete remedy, that is, one that eradicates proven violations rather than one that leads to the creation of new constitutional and statutory concerns, is also an abuse of discretion. See Chapman, 420 U.S.1, Roman, 377 U.S. 695, Connor, 431 U.S. 407.

B. This Court has established a remedial procedure for district courts to employ upon a finding of a Section 2 violation.

Since Reynolds v. Sims, 377 U.S. 533 (1964), this Court has developed standard procedures for district courts to follow when redistricting plans are found to violate federal law. Those procedures were stated clearly in Wise v. Lipscomb:

> When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution . . . .
>
> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation," Connor v. Finch, of the federal court to devise and impose a reapportionment plan pending later legislative action. In discharging this duty, the district courts "will be held to stricter stan-

> dards . . . than will a state legislature . . . ."

437 U.S. 535, 540 (1978) (citations omitted).

By following these approved procedures, a district court ensures that (1) proper deference is given to state authorities so that federal courts do not unnecessarily usurp state functions; (2) aggrieved minority communities have an opportunity to have proposed state plans judicially reviewed to determine compliance with federal law; and (3) there is no judicial error, and appellate review is possible, because an adequate record is developed. When a district court fails to follow the remedial procedures set by this Court, none of these safeguards is present.

As a result, district courts have traditionally conducted a two-phase proceeding: a liability phase, followed by a remedy phase, in the event liability is established. See, e.g., Gingles v. Edmisten, 590 F. Supp. 345. So clear and cogent is the approach taken by the Gingles three-judge court, it merits review here. The Gingles district court held two separate hearings and issued two separate opinions, the one addressing liability and the other, the appropriateness of the state legislative remedy. That district court thereby gave the state authorities the opportunity to correct the violation without abdicating its responsibility to ensure compliance with the duty to construct districts that did not dilute the voting strength of the protected class.

The Gingles district court relying upon White v. Weiser, 412 U.S. 783 (1973), allowed the state legislature an opportunity to devise new plans that would comply with

Section 2. United States Circuit Court Judge J. Dickson Phillips, writing for the Gingles district court, stated:

> Having determined that the present plan violates a secured voting right, our obligation remains, however, to provide affirmative judicial relief if needed to insure compliance by the state with its duty to construct districts that do not dilute the voting strength of the plaintiff class in the ways here found or in other ways.

Gingles v. Edmisten, 590 F. Supp. at 376 (citations omitted). Thus, the court declared that, in the event that the state failed to craft a remedy, the court would discharge its obligation to develop and implement an appropriate remedial plan. Id. Upon appeal of the Gingles decision, this Court tacitly approved the two-stage remedial approach that is now firmly embedded in the practice of district courts in Section 2 cases.[22]

In sharp contrast to the orderly procedure followed by the Gingles district court, the lower court in the instant case did not give the state Senate an opportunity to correct violations in its redistricting plan. Indeed, as a practical matter, the Senate could not and would not correct any violations until the court determined that violations existed. Furthermore, the lower court eliminated any incentive that the state Senate may have had to improve its plan by adopting the Senate plan as the permanent remedy. Finally, the district court did not afford the plaintiffs an opportunity to have proposed state plans judicially reviewed

---

[22] See, e.g., Meek v. Metropolitan Dade County, 805 F. Supp. 958 (S.D. Fla. 1992).

to determine compliance with federal law because it concluded, prematurely and erroneously, that an "ideal remedy" was not available. See Juris. Statement App. 77; Tr. VIII 53.[23] Upon reaching this conclusion, the district court compounded its error by reviving and implementing the state Senate plan -- the very plan it had just found to violate the Voting Rights Act. As a result, the clear violations of the Voting Rights Act found by the district court still exist in the present Florida state Senate plan.

Upon remand to the lower court for a remedial hearing, the Senate can be given the appropriate opportunity to cure those violations of Section 2 that have been determined. If, subsequently, the Senate fails to correct the violations of Section 2,[24] then, in that event, the plaintiffs

---

[23] See the discussion in Sections II.C and II.D, infra.

[24] Immediately prior to the beginning of the trial of this case in the court below, the Florida Supreme Court observed:

> As a consequence [of the Attorney General's Section 5 objection to the Hillsborough County portion of the Senate apportionment plan], this Court entered an order encouraging the Legislature to adopt a plan that would meet the objection of the Justice Department. However, the Court was advised that the Governor did not intend to convene the Legislature in an extraordinary apportionment session and the President of the Senate and the Speaker of the House of Representatives did not intend to convene their respective houses in an extraordinary apportionment session. Because it appeared that a legislative impasse had occurred, this Court determined to modify the Senate redistricting plan so as to resolve the objection of the Justice Department.

and other interested parties can present plans that do remedy those violations.

C. This Court has developed judicially manageable standards by which the completeness of Section 2 remedies can be measured.

This Court developed the three-pronged Gingles test to define a violation of Section 2, but it is also the measurement of whether a remedy is "complete." If the Gingles conditions remain even after a remedy is adopted, the court has not implemented a proper remedy because it will almost inevitably lead to new constitutional or statutory challenges. Connor v. Finch, 431 U.S. 407.

Specifically, the first Gingles prong is whether a minority group is "sufficiently large and a geographically compact" to comprise a majority in a single-member district. The definition of "sufficiently large" minority community within a "geographically compact" area is whether it is an effective voting majority. Gingles, 478 U.S. at 50 nn. 16, 17.[25] This definition is equivalent to that of cognizable "racial or political elements of the voting

---

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So. 2d 543, 544-545 (Fla. 1992) (emphasis added). Despite this history of the 1992 reapportionment process in the State of Florida, it is unclear whether the legislature would have remained unresponsive if it had been presented with a clear opportunity to correct the proven violation at a remedial hearing.

[25] An open question exists as to whether a majority group of less than 50% of the population of the district can, in certain circumstances, be "sufficiently large." Gingles, 478 U.S. 30 at 46 n.12. See note 19, supra and accompanying text.

population" articulated for constitutional litigation under Whitcomb v. Chavis, 403 U.S. 124, 143 (1971). This Court and other courts have used this standard to determine the existence of vote dilution. Growe, supra, at 42842 and 42843 n.5; Voinovich, supra, at 4101-102.

Since its articulation in Gingles, the effective voting majority test has also been used by the United States Attorney General in determining whether to preclear redistricting plans under Section 5 of the Voting Rights Act. See 28 C.F.R. §.51.55(b) (1991). Similarly, that test has been used by state redistricting authorities, and state courts drafting reapportionment plans, to insure their compliance with Section 2. See, e.g., Voinovich, supra, and Wilson v. Eu, 823 P.2d 545 (Cal. 1992).[26] In addi-

---

[26] As the Wilson court stated:

> We can avoid section 2 challenges to our new districts by eliminating the possibility of a minority group's proving any one of the three Thornburg prerequisites. The information from which our districts are drawn is furnished by the 1990 federal census, which tells us, as to each census tract, the total number of persons together with the numbers in particular categories of age, race and Latino origin. From that data, we can judge whether minority groups are "sufficiently large and geographically compact" to satisfy the first Thornburg prerequisite. The second and third prerequisites, however, depend upon what analyses of election results would show about a minority's political cohesiveness and about White majority bloc voting. . . .
>
> We have therefore drawn district lines so as to avoid either (1) unnecessary fragmentation of any sufficiently large, geographically compact protected minority group into two or more districts, or (2)

tion, other district courts have used the effective voting majority test to measure their own redistricting plans against this Court's remedial demands. See, e.g., Good v. Austin, 800 F. Supp. 557 (E. & W.D. Mich. 1992); Arizonans for Fair Representation v. Symington, No. Civ. 92-256-PHX-SMM (D. Ariz. April 30, 1992); Hastert v. State Bd. of Elections, 777 F. Supp. 634, 646 (N.D. Ill. 1991).

By leaving in place a redistricting plan that fragments a "sufficiently large" minority community as defined by Gingles, the court below failed to apply the first prong of the Gingles test. As a result, a plan is left in place in which white majority bloc voting usually defeats the candidate of choice of the minority community, which means the plan does not cure racial polarization, the third prong of the Gingles test.[27] Furthermore, a remedy that does not ameliorate the effects of white bloc voting cannot be "free from any taint of arbitrariness or discrimination." Roman v. Sincock, 377 U.S. 695. Finally, if, after remedy, one or more minority groups can still establish a prima facie case under Gingles, then the court has not avoided the creation of concerns that might lead to new

---

overconcentration of such a group in a single district. By thus preventing the dilution of the votes of any minority group that could qualify under the first Thornburg prerequisite, we can eliminate the possibility of section 2 challenges regardless of whether a group could fulfill the second or third prerequisite.

Wilson, 823 P.2d at 565.

[27] See note 13, supra and accompanying text.

constitutional challenges. See Connor v. Finch, 431 U.S. 407[28]

IV. THE DISTRICT COURT'S ABDICATION OF ITS REMEDIAL RESPONSIBILITY LED IT TO ADOPT AN ILLEGAL, DISCRIMINATORY STATE PLAN AND IGNORE THE FEASIBILITY OF AN "IDEAL REMEDY."

By not following the established remedial procedures, the District Court gave improper deference to an illegal legislative plan, failed to give the state an opportunity to correct proven violations, precluded aggrieved minority communities from the opportunity to test the state plan against the requirements of the Voting Rights Act and failed to develop a factual record upon which its conclusions could receive proper appellate review.

A. The district court's deference to the state plan that violated Section 2 of the Voting Rights Act was an error of law.

After finding Section 2 violations with respect to the state Senate,[29] the district court selected the

---

[28] These standards and a detailed explanation of the impact that they have on redistricting are contained in the Report to the Special Master adopted by this court during the congressional redistricting trial. See Report to the Special Master by the Independent Expert Witness 9-13.

[29] "[T]his court concludes that the plaintiffs have satisfied each of the three elements Gingles requires and that when considered together with the Senate factors, the "totality of the circumstances" show that with respect to Florida's Senate Plan, Hispanic and

legislature's plan -- the very plan it had just held to be unlawful -- as its remedy. The decision to maintain the state's plan was the result of a misconception or misapplication of this Court's preference for deferring to state authorities in developing remedial options. That misconception was rooted in the court's failure to follow the proper remedial procedure.

The proper deference that state authorities are given is twofold: first, the opportunity to address violations of federal law, of which the legislature was presumable unaware until the court's ruling in the liability phase and, second, a substantive deference to state authorities' political judgment in selecting a particular remedial plan. This second, substantive aspect of deference, however, is applicable if, and only if, the state-produced remedy complies with governing federal law.

For example, in Upham v. Seamon, this Court stated:

> [I]n the absence of any objection to the . . . districts by the Attorney General, and in the absence of any finding of a constitutional or statutory violation with respect to those districts, a court must defer to the legislative judgments the plans reflect, even under circumstances in which a court order is required to effect an interim legislative plan.

African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act.*

Juris. Statement App. 36 (emphasis added).

456 U.S. 37, 40-41 (1982) (emphasis added).

A court should defer to legislative judgments only when the state's political decisions are fully consistent with federal constitutional norms and, certainly, never when adherence to those decisions, as expressed in a legislative plan, would compromise the requirements of the federal constitution or statutes. "The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified." White v. Weiser, 412 U.S. 783, 797 (1973). While a temporary plan may be used because of pending elections, there is no justification for imposing a permanent plan that is tainted by illegality.

The court precluded the state reapportionment authorities from addressing the violations that had been found. It is, therefore, impossible to know whether those authorities would have drafted a plan that both met state policy goals and was also consistent with federal law.

In lieu of using a straightforward procedure to examine numerous options, the court below, instead, unnecessarily restricted itself to choosing among the preliminary plans[30] that had been introduced during the liability phase solely for the purpose of making out a prima facia case. In the absence of a remedial phase where both the legislature and the aggrieved communities had the

---

[30] Redistricting plans produced by plaintiffs during the liability phase of a Section 2 trial are offered for the purpose of meeting the first Gingles requirement, that of sufficient size and geographic compactness to comprise a district. Such plans are not typically offered as potential remedies unless and until liability is established.

proper respective opportunities to develop remedial plans, the court's misconception of the application of the concept of deference[31] led it to impose an illegal plan, SJR 2-G.

The legal authority the lower court cites for its decision to defer to the state's Senate plan is DeBaca v. County of San Diego, 794 F. Supp. 990 (S.D. Cal. 1992). The lower court's reliance on DeBaca for the proposition that it should defer to state political policy in the treatment of minority citizens is misplaced. The DeBaca court had found no Section 2 violation because of a lack of proof of cohesion among combined minority plaintiff groups and lack of polarized voting. Thus, the portion of the DeBaca opinion cited in the lower court's judgment is inapplicable to this case in which affirmative violations were established.

---

[31] Specifically, the court stated:

> We find that between all the plans presented to the court, the Florida Senate Reapportionment plan is the fairest to all the ethnic communities in Dade County and the surrounding areas, and is the proper remedy in this case. Consequently, this court gives deference to the state policy as expressed in the Florida plan as validated by the Florida Supreme Court and imposes that plan as the remedy in this case.

Juris. Statement App. 81.

B. The District Court placed a novel burden of proof upon the appellants, which is not required by the Voting Rights Act.

In addition to proving the three Gingles preconditions, the district court's opinion places upon one group of plaintiffs the unprecedented burden of showing that the plans introduced during the liability phase for the purpose of making out a prima facie case will not weaken the electoral strength of other minority communities. In its ruling from the bench, the district court stated:

> [T]he plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida.

Juris. Statement App. 27-28; Tr. VIII 53 (emphasis added).

This is error for at least two reasons. First, while retrogression is a legitimate concern in a remedy hearing, in contrast, during the liability phase, no party can respond to a court's remedial concerns until the court has determined whether a violation has been established. For example, until the court ruled from the bench, it was entirely unclear to all parties whether the NAACP had established a Section 2 violation.[32] Absent this finding of

---

[32] At the beginning of the trial, the district court precluded the NAACP plaintiffs from pursuing their own, independent claim that the state's failure to draw three majority black districts constituted a

a Section 2 violation with regard to the African-American community, the De Grandy Appellants (the Hispanic plaintiffs below) would have had to offer only a "four-two" plan, rather than a "four-three" plan.

In addition, the manner in which the remedy is drawn cannot be determined in advance of the liability finding. The district court's method failed to give the parties adequate notice or adequate opportunity to respond and be heard. Notwithstanding the foregoing, immediately upon issuing the court's liability ruling, the De Grandy plaintiffs proffered a "four-three" plan in connection with their motion for reconsideration, which was denied. In light of this offer of proof, the court's conclusion that a "four-three" plan was not feasible is incomprehensible and plain error.

C. There is no proper record evidence to support the District Court's conclusion that its "ideal" remedy -- the elimination of all dilution of both the Hispanic and African-American communities -- was not possible.

According to the findings of the district court below, the Hispanic (De Grandy) and African-American (Reaves/Humphrey, NAACP) plaintiff groups not only

---

Section 2 violation. The court, through District Court Judge Vinson, stated to counsel for the NAACP: "So we are going to limit your presentation of evidence solely to the issue of the regression effect upon the establishment of the fourth super-majority or majority Hispanic districts with regard to the regression that might have on the black districts." Tr. III 123.

established Section 2 violations, but also demonstrated the ability to draw proper remedial plans for their respective groups.

> The De Grandy/Reaves/Humphrey plaintiffs have established that four geographically compact districts can be drawn in which Hispanics in Dade County would have the potential to elect candidates of their choice. . . .
>
> The NAACP has established that three geographically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP majority districts. . . .
>
> This court is faced with two independent, viable Section 2 claims in South Florida and our remedy must address both of those claims. An ideal solution would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts in South Florida.

Juris. Statement App. 70, 72, 73.

Despite the foregoing findings, the district court concluded that, "[t]he evidence in this case, however, established that the ideal remedy for the Section 2 viola-

tions in this case is not a viable option." Juris. Statement App. 73. This conclusion is not supported by the record.

In fact, the court cited the following exchange between United States Circuit Court Judge Joseph W. Hatchett and John Gutherie, Staff Director of the Senate Committee on Reapportionment, purportedly to support the court's negative conclusion about the possibility of creating an ideal plan containing four Hispanic and three African-American districts:

> JUDGE HATCHETT: Yes, he has the answer. I have a question, though. From all of your experience working in South Florida, is it possible to draw four VAP majority Hispanic districts and three majority Black districts?
>
> . . . .
>
> THE WITNESS: It's amazing, Your Honor, what you can do with these computers.
> . . .
>
> If you ask me would I believe that you could do it, I would believe that. But it gets to the notion of -- because of numerosity -- of how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accomplish that.
>
> JUDGE HATCHETT: You've answered my question.

Juris. Statement App. 73-74; Tr. IV 194-195. Thus, this statement, made by an expert witness called by the state Senate, actually indicated that the court's "ideal" four Hispanic, three African-American district plan could be drawn.

Similarly, the court also relied upon a statement of Mr. Charles Burr, counsel for the NAACP, in reaching the conclusion that four Hispanic and three African-American districts could not be drawn:

> MR. BURR: It is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable.

Juris. Statement App. 74; Tr. IV 217.[33]

Mr. Burr's unsworn statement not only lacks any evidentiary value, but also represents nothing more than his opinion of how the parties might view some potential "four-three" plan. As with Mr. Gutherie's statement, Mr. Burr's comment does not negate the possibility of drawing such a remedial plan. Neither statement provides any proper evidentiary support for the court's conclusion that a "four-three" plan could not be achieved.

In concluding that "ideal" Hispanic and African-American remedies would be mutually exclusive, the

---

[33] The court concluded that in order to draw an effective African-American district, a bare majority of voting age population was necessary; to draw a viable Hispanic district, a supermajority district of 59-60 percent might be necessary. Juris. Statement App. 69-72.

court's analysis included a critique of some of the plans submitted by the parties during the liability phase of the trial. None of the parties had any reason to know the court's concerns about plans that were offered for liability purposes. In fact, the court announced to all of the parties before the trial that they would have an opportunity to examine remedial plans if liability were established.

> JUDGE VINSON: If we find that there is, in fact, a Section 2 violation, then this [plan] becomes a remedy, among any number of remedies available, upon which the Court can act. I think at that time it would be appropriate for us to consider.
>
> Tr. III 123-124.
>
> JUDGE HATCHETT: And note, however, that Judge Vinson did indicate that in the event a Section 2 violation is found, and this Court is then to the point of giving a remedy, you will be heard on the proper remedy.

Tr. III 126.

Thus, the lower court initially recognized its clear duty to conduct a remedial hearing, but changed its course midstream. Because the district court did not conduct a full remedial proceeding, none of the parties had an opportunity to respond to the court's erroneous perception that the plans offered by the minority communities during the liability phase were "mutually exclusive," and the district court lacked a sufficient evidentiary basis for its conclusion that the "ideal" remedy was impossible.

D. The De Grandy Appellants presented a plan that provided a complete remedy.

The De Grandy Appellants proffered evidence of the ability to draw a practical, effective districting plan with four Hispanic and three African-American majority districts ("four-three" plan). This demonstrated that the court's "mutually exclusive" analysis was flawed. See Affidavit of Rockie Pennington, Juris. Statement App. 112-113. The De Grandy Appellants also moved for reconsideration of the court's remedial determination, based on their "four-three" Senate plan. This motion was denied.

Appellants' "four-three" Senate plan ("Plan 345") met all the population criteria adopted by the court below in its Gingles analysis during the liability phase.[34] Four Senate districts contained the following percentages of Hispanic voting age population: 65.3%, 64%, 60% and 69.2%. Plan 345 also created districts containing the following percentages of African-American voting age population: 52.5%, 55.3% and 52.3%.

Remedial Plan 345 removes any evidentiary basis for the conclusion that remedies for Hispanics and African-Americans were mutually exclusive. The court's failure to examine that plan was an abuse of discretion. During a properly conducted remedial hearing, Plan 345 (and other

---

[34] The district court found "that a district with an African-American majority VAP is an effective district which gives African-Americans a potential for electing candidates of their choice." Juris. Statement App. 43. The court also determined that Hispanic VAP of 60 percent would likewise be effective. Juris. Statement App. 48-49.

plans) could have been considered to ensure that the Section 2 violations were remedied.

CONCLUSION

For the reasons stated herein, the judgment of the lower court should be reversed and the case remanded to require the court below to conduct a proper remedial procedure.

C. Allen Foster*
Robert N. Hunter, Jr.
Marshall R. Hurley
Patton, Boggs & Blow
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
Rumberger, Kirk & Caldwell
P.O. Box 10507
Tallahassee, FL 32302
(904) 222-6550

Alberto R. Cardenas
Ferrell, Cardenas, Fertel & Morales
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
***Counsel of Record**

Nos. 92-767 and 92-593

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF FLORIDA, ET AL.

MIGUEL DE GRANDY, ET AL., APPELLANTS

v.

BOLLEY JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

The district court found that the State of Florida's redistricting plan for the Florida Senate violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973. The court nonetheless adopted the same plan as the "remedy" for this violation. The questions presented are:

1. Whether the district court erred when it refused to conduct remedial proceedings concerning the possibility of providing complete relief for the Section 2 violations it had found, and instead summarily adopted as a permanent remedy the very plan it had found violated Section 2.

2. Whether the district court erred in failing to provide complete relief to Hispanic voters for Section 2 violations because doing so might result in the loss of an African-American "influence" district.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the defendants were T.K. Wetherell, Speaker of the Florida House of Representatives; Gwen Margolis, President of the Florida Senate; Lawton Chiles, Governor of the State of Florida; Robert A. Butterworth, Attorney General for the State of Florida; Peter R. Wallace, Chairman of the House Reapportionment Committee; Jack Gordon, Chairman of the Senate Reapportionment Committee; and Jim Smith, Secretary of State for the State of Florida.

In the consolidated case of *De Grandy* v. *Wetherell*, No. 92-40015-WS, Miguel De Grandy, Mario Diaz-Balart, Andy Ireland, Casimer Smericki, Van B. Poole, Terry Ketchel, Roberto Casas, Rodolfo Garcia, Jr., Luis Rojas, Lincoln Diaz-Balart, Javier Souto, Justo Luis Poso, Alberto Cardenas, Rey Velazquez, Luis Morse, Alberto Gutman, Karen E. Butler, Sgt. Augusta Carter, Jean Van Meter, Anna M. Pinellas, Robert Woody, Gina Hahn, Bill Petersen, Terry Kester, Margie Kincaid, and Brooks White were plaintiffs in the district court. T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Gwen Margolis, in her official capacity as President of the Florida Senate, Lawton Chiles, in his official capacity as Governor of the State of Florida, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee, Jim Smith, in his official capacity as Secretary of State of Florida, and Robert Butterworth, in his official capacity as Attorney General of Florida, were defendants in the district court.

In the consolidated case of *Florida State Conference of NAACP Branches* v. *Chiles*, No. 92-40131-WS, the plaintiffs were Florida State Conference of NAACP Branches, T.H. Poole, Sr., Whitfield Jenkins, Leon W. Russell, Willye Dennis, Turner Clayton, Rufus Brooks, Victor Hart, Kerna Iles, Roosevelt Walters, Johnnie McMillian, Phyllis Berry, Mary A. Pearson, Mable Butler, Iris Wilson, Jeff Whigham, Al Davis, Peggy Demon, Carlton Moore, Richard Powell, Neil Adams, Leslie McDermott, Robert Saunders, Sr., Irv Minney, Ada Moore, Anita Davis, and Calvin Barnes. The defendants were Lawton Chiles, in his official capacity as Governor of Florida, Jim Smith, in his official capacity as Secretary of State of Florida, Robert Butterworth, in his official capacity as Attorney General of Florida, Gwen Margolis, in her official capacity as President of the Florida Senate, T.K. Wetherell, in his official capacity as Speaker of the Florida House of Representatives, Jack Gordon, in his official capacity as Chairman of the Senate Reapportionment Committee, and Peter R. Wallace, in his official capacity as Chairman of the House Reapportionment Committee.

The court below also granted the following persons and organizations leave to act as amicus curiae: Simon Ferro, State Chairman of the Florida Democratic Party; Common Cause; Florida AFL-CIO; United States Representative Craig James; the Cuban American Bar Association; The Coalition of Hispanic Women; and State Representative Daniel Webster. Plaintiff-intervenors include Gwen Humphrey, Vivian Kelly, Gene Adams, Wilmateen W. Chandler, Dr. Percy L. Goodman, Jesse L. Nipper, Moease Smith, and Carolyn L. William; State Representa-

tives Darryl Reaves, Corinne Brown and James T. Hargrett; United States Representative Jim Bacchus; and United States Representative Andy Ireland. State Representative Alzo Reddick is a defendant-intervenor.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statute involved	2
Statement	3
Argument:	
The district court erred in summarily adopting as a permanent remedy the very plan it found in violation of Section 2, without holding a hearing to determine whether more complete relief was possible	11
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Chapman v. *Meier*, 420 U.S. 1 (1975)	12
Connor v. *Finch*, 431 U.S. 407 (1977)	12
Davis v. *Board of School Commissioners*, 402 U.S. 33 (1971)	11
Franks v. *Bowman Transp. Co.*, 424 U.S. 747 (1976)	11
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977)	12
McGhee v. *Granville County*, 860 F.2d 110 (4th Cir. 1988)	11, 12
Reynolds v. *Sims*, 377 U.S. 533 (1964)	11
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	6, 15
Upham v. *Seamon*, 456 U.S. 37 (1982)	19
Voinovich v. *Quilter*, 118 S. Ct. 1149 (1993)	17
White v. *Weiser*, 412 U.S. 783 (1973)	11
Wise v. *Lipscomb*, 437 U.S. 535 (1978)	12

Statute:

Voting Rights Act of 1965, § 2, 42 U.S.C. 1973	*passim*

Miscellaneous:

S. Rep. No. 417, 97th Cong., 2d Sess. (1982)	11

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-767

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF FLORIDA, ET AL.

No. 92-593

MIGUEL DE GRANDY, ET AL., APPELLANTS

v.

BOLLEY JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 7a-76a)[1] is reported at 794 F. Supp. 1076.

---

[1] All references to the J.S. App. are to the Appendix to the jurisdictional statement in No. 92-767, *United States* v. *Florida*. The district court's judgments (J.S. App. 1a-6a) and opinion (J.S. App. 7a-76a), however, are identically paginated in the Appendix to the jurisdictional statement in No. 92-519, *Johnson* v. *De Grandy*.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 4a-6a) was entered on July 2, 1992. A notice of appeal was filed on July 31, 1992. J.S. App. 106a-107a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. This Court noted probable jurisdiction on February 22, 1993. 113 S. Ct. 1249.

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

In response to the 1990 census, the State of Florida adopted redistricting plans for the Florida Senate and the Florida House of Representatives. A three-judge district court found that the Senate plan violated the rights of Hispanics and African-Americans under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The court, however, then adopted that very plan as a permanent remedy for those violations. The United States and a group of private plaintiffs (the De Grandy plaintiffs) have filed appeals from that judgment. The three-judge court also found that the Florida House of Representatives redistricting plan violated the Section 2 rights of Hispanics and adopted a plan to remedy that violation. House officials have appealed from that judgment. This Court consolidated all three appeals and noted probable jurisdiction. 113 S. Ct. 1249 (1993). In this brief, we address the issues raised by the appeals from the district court's judgment concerning the Florida Senate redistricting plan, *United States* v. *Florida*, No. 92-767, and *De Grandy* v. *Johnson*, No. 92-593.

1. On June 23, 1992, the United States filed suit against the State of Florida, alleging that the State's redistricting plan for the Florida Senate violated Section 2 of the Voting Rights Act. The United States alleged that the Senate plan fragments Hispanic population concentrations in the Dade County area so that Hispanics comprise a majority of the voting age population (VAP) in only three Senate districts.

J.A. 75. The complaint further alleged that if districts in the Dade County area "respect[ed] communities of interests and follow[ed] other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in * * * one additional district." J.A. 76. Citing racially polarized voting and other factors, the complaint alleged that "[u]nder the totality of circumstances, * * * the redistricting plan[] * * * deprive[s] Hispanic citizens * * * in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." J.A. 77.

The United States' suit was consolidated with two other redistricting suits. One was filed by the De Grandy plaintiffs, who had made allegations similar to those made by the United States. The other was filed by the NAACP and several individuals, who had challenged the continued use of the plan that predated the 1990 Census. J.S. App. 12a, 18a-20a. A three-judge district court assumed jurisdiction over the consolidated cases. See *id.* at 12a, 19a & n.10.

On June 26, 1992, the United States sought a preliminary injunction against the use of the State's Senate redistricting plan in the upcoming primaries. I Tr. 52-53. Rather than acting on that request, the district court decided to conduct an expedited trial on the merits. J.S. App. 19a.

At trial, the NAACP alleged for the first time that the State's plan violated the Section 2 rights of African-Americans because it created two Senate districts in which African-Americans constituted a voting majority, while three such districts should have been created. J.A. 430-431. The district court

initially ruled that the NAACP's claim was untimely. J.A. 436. The court explained that "to affirmatively propose the three districts * * * catches everyone by surprise, and that's unfair in our judgment." *Ibid.* The court further stated that it would "limit [the NAACP's] presentation of evidence solely to the issue of the regression effect [that] the establishment of the fourth super-majority or majority Hispanic district[] * * * might have on the black districts." *Ibid.*[2] The court thus refused to admit the NAACP's alternative Senate plan into evidence. *Ibid.* After subsequent witnesses referred to the plan in their testimony, counsel for the NAACP again offered the plan into evidence. VI Tr. 185. The court then admitted the plan. VI Tr. 185-188. At closing argument, the NAACP argued that the evidence established that the State's failure to create a third African-American majority district violated Section 2. J.A. 473-475.

2. On July 1, 1992, at the conclusion of trial, the district court ruled that none of the plaintiffs were entitled to the relief they sought with respect to the Senate plan. In an opinion issued on July 17, 1992, the court explained that ruling. J.S. App. 7a-76a.[3]

---

[2] Later the same day, counsel for the NAACP acknowledged that "we were basically precluded from going forward with our Section 2 case. That's an issue for another day." III Tr. 193.

[3] The July 2 judgment stated that "[t]he state of Florida's state senatorial districts * * * do not violate Section 2 of the Voting Rights Act of 1965" and ordered that "[t]he defendants * * * shall * * * conduct state senatorial elections in 1992" and "in years after 1992" in accordance with the state plan. J.S. App. 5a. When the court issued its opinion on

Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court concluded that the State's plan violates the Section 2 rights of both Hispanics and African-Americans. The court found that while the State's plan creates three districts in which Hispanics would constitute a voting majority and two districts in which African-Americans would constitute a voting majority, each group is sufficiently large and geographically compact to constitute a voting majority in one additional district. J.S. App. 40a-44a & n.30, 54a-55a. The State's plan fails to create either of the additional districts, the court found, instead fragmenting the Hispanic and African-American populations in Dade County. *Id.* at 55a-56a, 59a-60a.

The court also found that Hispanics and African-Americans are each "politically cohesive among themselves" and that both are victims of bloc voting. J.S. App. 44a-53a. Specifically, the court found that whites in combination with African-Americans usually vote sufficiently as a bloc to defeat the candidates preferred by Hispanics, unless those candidates run in

---

July 17, it noted that "[w]e held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act." J.S. App. 72a. The court explained that

> [t]his language should be read as holding that the Florida Senate plan does not violate Section 2 such that a different remedy must be imposed. In other words, *although the Florida Senate plan violates Section 2 of the voting rights act*, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area.

Ibid. (emphasis added). See J.S. 9 n.7; U.S. Br. in Opp. to Motion to Dismiss or Affirm 1-3.

districts in which Hispanics constitute a voting majority. *Id.* at 48a-52a. Similarly, it found that whites together with Hispanics usually vote sufficiently as a bloc to defeat African-American sponsored candidates. *Id.* at 52a-53a.

In addition, the court cited evidence that Dade County is "profoundly divided" by the competing interests of Hispanics, African-Americans, and whites, each having different social and economic interests. J.S. App. 50a. Tensions among the three groups, the court noted, have caused "ethnic factors * * * [to] predominate over all other factors in Dade politics." *Id.* at 50a-51a. The court also found substantial evidence of discrimination against both Hispanics and African-Americans. *Id.* at 53a-54a. The court noted that although there was disagreement "as to whether Hispanics or African-Americans bore more of the brunt of discrimination, everyone agreed that both groups had suffered." *Id.* at 54a.

Based on those findings, the court concluded that the "'totality of the circumstances' show that * * * Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act." J.S. App. 30a.

3. Having determined that the State's Senate plan violates the Section 2 rights of Hispanics and African-Americans, the court nonetheless ordered that the Senate plan itself be put into effect as a remedy. The court acknowledged that, given the nature of the violation, the preferred remedy "would be to order the drawing of four supermajority VAP Hispanic districts and three majority VAP African-American districts." J.S. App. 60a. Although the court did not hold a remedial hearing, it concluded that such a 4-3 plan was "not a viable option." *Id.* at 60a.

In reaching that conclusion, the court relied upon testimony from the State's redistricting expert, who stated that "[i]t's amazing * * * what you can do with these computers," that he "would believe" that a 4-3 plan was possible, and that it depends on "how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accomplish that." J.S. App. 60a (quoting J.A. 331). That witness also stated that, although he had not attempted to develop a 4-3 plan, he thought it would be "very difficult to do that." J.A. 337. The court also cited a statement by NAACP counsel that "it is technically feasible to draw a four and three, but we were completely unable [after approximately ten hours of work] to get the percentages of the districts up to a level that I believe the parties will find acceptable." J.A. 342; see J.S. App. 61a.

As the court saw the situation, it could remedy the violation against Hispanics by drawing a plan with four Hispanic majority districts, or it could remedy the violation against African-Americans by drawing a plan with three African-American majority districts, but it could not do both. J.S. App. 63a. Under those circumstances, the court concluded that the State's plan struck the "fairest balance." *Id.* at 64a. The court described the State's plan as a "compromise" that created three Hispanic majority districts, two African-American majority districts, and one African-American "influence district." *Ibid.* Although African-Americans would constitute only 35.5% of the VAP in the "influence district," the court found that African-Americans could "elect a candidate of their choice because of strong minority

coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." *Id.* at 65a.

The court preferred the State's plan over Plan 180 (the Reaves Hargrett Brown plan), which had been introduced by another group of plaintiffs. That plan included four Hispanic majority districts, two African-American majority districts, and an African-American influence district in which African-Americans constituted 47.1% of the VAP. J.S. App. 61a-63a. The court concluded that Plan 180 had a "retrogressive" effect upon African-Americans when compared to the State's plan. *Id.* at 63a. Based on an analysis of voter turnout, the court determined that Plan 180's influence district would not be an "African-American majority seat." *Ibid.* For that reason, the court concluded that the influence district was "ineffective." *Ibid.* Believing the State's plan to be the "fairest to all the ethnic communities in Dade County and the surrounding areas," the court "impose[d] that plan as the remedy in this case." *Id.* at 66a.

4. Immediately after the court issued its ruling from the bench, the De Grandy plaintiffs moved for reconsideration. In support of the motion, the De-Grandy plaintiffs informed the court that they had prepared a plan for the remedial phase of the case that created four majority Hispanic and three majority African-American districts. J.A. 482. The court denied that motion without explanation. *Ibid.*

SUMARY OF ARGUMENT

Once it has found a violation of law, the court in a voting rights case, as in any other case, must attempt to provide the plaintiffs with a remedy. In this case, however, the district court found two distinct violations of Section 2 of the Voting Rights Act—as to Hispanics and as to African-Americans—yet it failed even to hold a hearing to determine the feasibility and content of a remedy for either violation. In our view, a complete remedy for both violations was possible, and the court erred in refusing to hold a hearing to consider the question.

The court justified its refusal to hold a hearing on the ground that, based on evidence introduced at the liability phase of the trial, providing a remedy for either violation would have been inconsistent with remedying the other. The evidence on which the court relied to reach that conclusion was entirely inadequate. More importantly, however, the court had no basis for assuming that evidence at the liability phase of the trial was sufficient to determine whether a complete remedy was possible. Plaintiffs had never been informed that they were required to show that remedying the violations they alleged would be consistent with remedying different, and theretofore unproved, violations alleged by other parties. Nor should any of the plaintiffs have been expected to make such a showing as part of their proof of the Section 2 violations that they alleged. As a result, the question whether a complete remedy was possible was never fully and fairly litigated. The court erred in refusing to permit evidence and argument on that question before adopting as a "remedy" the very plan that embodied the Section 2 violations.

ARGUMENT

THE DISTRICT COURT ERRED IN SUMMARILY ADOPTING AS A PERMANENT REMEDY THE VERY PLAN IT FOUND IN VIOLATION OF SECTION 2, WITHOUT HOLDING A HEARING TO DETERMINE WHETHER MORE COMPLETE RELIEF WAS POSSIBLE

Applying this Court's decision in *Gingles*, the district court found that the State of Florida's Senate redistricting plan violated the Section 2 rights of both Hispanics and African-Americans. This appeal does not raise any question concerning those liability determinations. Rather, this appeal relates solely to the court's approach to remedying those violations.

The proper approach to remedying a Section 2 violation is no different from the proper approach to remedying a violation of any other federal right. Guided by "well-known principles of equity," *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964), a court must seek to provide complete relief. *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770-771 (1976); *White* v. *Weiser*, 412 U.S. 783, 797 (1973); *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971). In a Section 2 case, that means that "[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982); see also *McGhee* v. *Granville County*, 860 F.2d 110, 118 (4th Cir. 1988).

Because of the imperative that the court provide complete relief if possible, it is particularly important

that the court afford the parties a full opportunity to introduce evidence on that issue before making its own findings. As this Court's decisions make clear, the State must be given an opportunity to submit a plan that remedies the violation. If the State submits such a plan, the court is required to defer to it. *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.); *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); see *McGhee*, 860 F.2d at 115. But when the State's plan does not provide complete relief, the court is not excused from its obligation to remedy the violation as completely as possible. If the court concludes that the State's plan is inadequate and that a more complete remedy is possible, it must fashion its own remedial plan. *Connor* v. *Finch*, 431 U.S. at 415; *Chapman* v. *Meier*, 420 U.S. at 27.

The court need not follow a rigid procedure in determining whether the State's remedy is adequate and whether a more complete remedy is possible. If those issues have been fully and fairly litigated during the liability phase of the trial, the court need not conduct a special remedial hearing afterwards. But if those issues have not been adequately litigated, the court may not simply enter a final judgment adopting an inadequate state plan. It must give the plaintiffs a chance to show that complete relief is possible. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 361 (1977) (when remedial issues have not been fully litigated during trial, court must conduct additional proceedings to determine scope of relief).

1. In this case, the district court never gave plaintiffs the opportunity to establish that it was possible to fashion a remedy for the violation they had alleged and proved. After hearing closing argument on liability, the court recessed briefly. J.A. 476. Upon its return, the court announced that "the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the *Gingles* standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida." J.A. 477. The court concluded that "under Supreme Court precedent, this Court must give deference to the state policy as expressed in" the State's redistricting plan. *Ibid.* The court then announced that it would issue a judgment on the Senate case immediately. *Ibid.* After a brief colloquy, the court clarified that it "has at this time ruled against all plaintiffs * * * as to the Senate." J.A. 482. The De Grandy plaintiffs immediately moved for reconsideration, noting that they "ha[d] a plan prepared for the remedial portion, had we got to that, that would show four Hispanic districts * * * and three black districts." *Ibid.* The court denied the motion summarily, *ibid.*, and heard no further evidence or argument regarding the Senate claims.

In its written opinion, the court clarified the basis for its ruling. The court found that the State had violated Section 2 by failing to draw a fourth Hispanic majority district and by failing to draw a third African-American majority district, and the court acknowledged that the "ideal" remedy for those violations would have been a 4-3 plan. J.S. App. 60a. In the court's view, however, such a remedy was not possible. *Ibid.* For that reason, the court explained, it had imposed as a permanent remedy the

very State plan it had just found in violation of Section 2. J.S. App. 63a-66a.

The district court was wrong to give up so quickly on the possibility of formulating a 4-3 plan, or at least on attempting to formulate a plan that would remedy one of the violations. In doing so, the court relied on the testimony of the State's redistricting expert. J.S. App. 60a. But the State's expert did not testify that it would be impossible to devise a 4-3 plan. Rather, he expressed an opinion that it would be "very difficult" to fashion such a plan, J.A. 337, and he disclaimed any ultimate opinion by stating, in response to the court's inquiry, that "[i]t's amazing, Your Honor, what you can do with these computers." J.A. 331; see J.S. App. 60a. The court also cited (J.S. App. 61a) the statement of NAACP counsel that he had spent "approximately ten hours" trying to develop such a plan and had not succeeded. J.A. 342. A statement of counsel, however, is not evidence, and the fact that he could not develop an acceptable plan in ten hours hardly supports the conclusion that no such plan could be developed at all. The district court therefore did not have sufficient evidence before it to conclude that a 4-3 plan would be impossible.

More importantly, however, the court's resolution of this issue was procedurally flawed. The court never informed the parties that it would determine the feasibility of a 4-3 plan on the basis of evidence introduced during the liability phase of the trial. The only discussion of that issue occurred when the court itself initiated some brief questioning on that subject directed to the State's redistricting expert. J.A. 331. All concerned clearly understood the court's questioning to be a preliminary inquiry into an issue that

would be litigated during the remedial phase of the trial in the event the court ultimately concluded that the State's plan violated the Section 2 rights of both Hispanics and African-Americans. IV Tr. 8, 205-210; see also J.A. 436, 438, 482. By failing to conduct such a remedial hearing, the district court deprived the United States and the De Grandy plaintiffs of any opportunity to show that complete relief was possible.

Neither the United States nor the De Grandy plaintiffs ever waived their right to a hearing directed to that issue. To the contrary, as noted above, immediately after the court ruled from the bench, the De Grandy plaintiffs moved for reconsideration and informed the court that they had prepared a 4-3 plan for the remedial phase of the trial. J.A. 482. The district court refused to schedule such a hearing, even though the De Grandy plaintiffs were prepared to show that what the district court viewed as impossible could in fact be done.

The district court's decision to dispense with remedial proceedings cannot be justified on the theory that the United States was required to show that a 4-3 plan was possible in order to prove liability. In *Gingles*, this Court held that, in order to establish a Section 2 violation, a plaintiff must show that a remedy is possible for the violation it has alleged. 478 U.S. at 50 & n.17. Because the United States in this case claimed that the State violated the Section 2 rights of Hispanics by failing to draw a fourth Hispanic majority district, the United States had to show that such a district could be drawn. As the district court found, the United States satisfied that burden. J.S. App. 57a-58a. Although the NAACP alleged that the State violated the Section 2 rights of

African-Americans by failing to draw a third African-American majority district, neither the United States nor the De Grandy plaintiffs made such an allegation. Nothing in *Gingles* requires a plaintiff to make a threshold showing that it is possible to remedy both the violation it has alleged and a distinct violation alleged by another party.

2. Appellees have tried to defend the district court's decision on a different ground. They have argued that the parties were on notice of the need to draw a 4-3 plan because the court ruled at trial that it would consider whether the creation of a fourth Hispanic majority district would have a "regressive" effect upon African-Americans. Motion to Dismiss or Affirm 27. Appellees are mistaken.

The issue raised by the court was whether the creation of a fourth majority Hispanic district would result in less opportunity for African-Americans to elect candidates of their choice than would the State's plan. The State's plan had two African-American majority districts and one African-American "influence" district in which African-Americans constituted 35.5% of the VAP. J.S. App. 64a-65a. Accordingly, to satisfy the concern raised by the court, it would only have been necessary for the plaintiffs to show that it was possible to devise a plan with four Hispanic majority districts, while preserving two African-American majority districts and one African-American influence district. The plaintiffs met that burden when they introduced Plan 180. As the district court found, that plan included four Hispanic majority districts, two African-American majority districts, and an African-American influence district in which African-

Americans constituted 47.1% of the VAP—a percentage well in excess of that under the State's plan. J.S. App. 61a-62a.

The district court found that the State's plan had an *effective* influence district, but that Plan 180 did not. J.S. App. 63a, 65a-66a. Accordingly, the court found that Plan 180 had a "retrogressive" effect upon African-Americans. J.S. App. 63a. In making that finding, however, the court applied a different and more stringent legal standard to the influence district in Plan 180 than it did to the influence district in the State's plan.

In gauging the effectiveness of the State's influence district, the court asked whether there would be sufficient crossover from white and Hispanic voters to permit African-Americans to elect candidates of their choice, even though they constituted a voting minority. J.S. App. 65a. As this Court indicated in *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1155, 1157 (1993), that is the proper standard for judging the effectiveness of an influence district.

The district court did not apply that standard to the influence district in Plan 180. To do so would have required the court to inquire whether there was sufficient crossover voting by whites and Hispanics to permit African-Americans to elect the candidates of their choice in that district, even though they would constitute a minority of the voting age population. Yet the court did not undertake that inquiry. Instead, it employed the State's expert's "turnout test," VI Tr. 136, see J.A. 469-470—which looked to whether African-Americans would constitute a majority of the voters who actually turned out on election day—to determine whether Plan 180 created a

third "African-American *majority* seat in South Florida." J.S. App. 63a (emphasis added).

Had the court applied the correct legal standard, it would have concluded that the influence district in Plan 180 was just as effective as the one in the State's plan. Because of the presence of Hispanic noncitizens in Plan 180's influence district, African-Americans (who constitute 47.1% of the VAP, see J.S. App. 62a) are probably at least very close to a majority of the eligible voters. Moreover, because the African-American VAP in the Plan 180 influence district is 11.6 percentage points higher than the 35.5% African-American VAP in the State's influence district, see J.S. App. 65a, African-Americans would need a far lower level of crossover voting to elect candidates of their choice. Finally, the evidence shows that African-American sponsored candidates would have won had they run in Plan 180's influence district. See Humphrey Intervenor Exh. 4 (District Summary Selected Statewide Races with Black candidates, p. 2—District 28) (congressional redistricting hearings).

Thus, even if the district court could have dispensed with a remedial hearing if Plan 180 was "regressive," the court applied the wrong analysis in concluding that it was regressive. Accordingly, the judgment below, as it concerns the State Senate, cannot be supported on the basis of the alternative rationale proffered by the State.

3. More fundamentally, once the district court determined that the State's plan violated the Section 2 rights of Hispanics and African-Americans, the relevant question was not whether Plan 180 had an effective African-American influence district, but whether it was possible to fashion a remedial plan

containing four Hispanic majority districts and three African-American majority districts. Because the parties never had an opportunity to address that distinct question, the district court erred in failing to conduct remedial proceedings and in summarily entering a judgment that remedied neither violation.

It is true that the district court was operating under severe time constraints because of the need to decide whether the State's plan could be used in the upcoming primaries. A remedial hearing to determine whether a 4-3 plan was possible (and, if not, what remedy would be appropriate) could have been difficult to finish in time for the 1992 elections. The court thus might have been justified in permitting the State's plan to be used as an interim plan for those elections. See *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982) (when elections are imminent, district court has authority to permit them to be held under plans "that do not in all respects measure up to the legal requirements").

In this case, however, the district court not only allowed the State's plan to be used in the 1992 elections, but also entered a final judgment ordering the State to continue using that plan for future elections. The court was not justified in entering that judgment without first conducting fully adequate remedial proceedings to determine whether more complete relief was possible.

CONCLUSION

The district court's remedial order should be reversed and the case should be remanded with directions to conduct further proceedings to determine the proper remedy for future elections.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JAMES A. FELDMAN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
IRVING GORNSTEIN
Attorneys

APRIL 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60252

Nos. 92-519, 92-593, 92-767

Supreme Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

JOINT APPENDIX

DONALD B. VERRILLI, JR.*
SCOTT A. SINDER
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
Counsel for Executive and House Appellants

RICHARD E. DORAN
GEORGE L. WAAS
GERALD B. CURINGTON
Assistant Attorneys General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32399
(904) 488-1573
Counsel for Executive Appellants

KEVIN X. CROWLEY
JAMES A. PETERS
COBB, COLE & BELL
131 North Gadsden Street
Tallahassee, Florida 32301
(904) 681-3233
Counsel for House Appellants

C. ALLEN FOSTER *
ROBERT N. HUNTER, JR.
MARSHALL R. HURLEY
PATTON, BOGGS & BLOW
Post Office Drawer 20004
Greensboro, NC 27401
(919) 273-1733
Counsel for De Grandy Appellees

[Additional Counsel Listed on Inside Cover]

JURISDICTIONAL STATEMENT FILED SEPTEMBER 22, 1992
PROBABLE JURISDICTION NOTED FEBRUARY 22, 1993

E. THOM RUMBERGER
GEORGE N. MEROS, JR.
DANIEL J. GERBER
RUMBERGER, KIRK & CALDWELL
Post Office Box 10507
Tallahassee, Florida 32302
(902) 222-6550
Counsel for
De Grandy Appellees

JOEL I. KLEIN
PAUL M. SMITH
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for State of Florida

STEPHEN N. ZACK *
NORMAN C. POWELL
ZACK, HANZMAN, PONCE & TUCKER, P.A.
3300 International Place
100 S.E. Second Street
Miami, Florida 33131
(305) 539-8400
Counsel for State of Florida

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for United States

* Counsel of Record

TABLE OF CONTENTS

ITEM		Page
1.	District Court Docket Entries	1
2.	Excerpts from Stipulated Facts Submitted to the Special Master in the Congressional Districting Proceeding, April 3, 1992	15
3.	House Defendants' Exhibit 7 (Notice of Filing of the Evaluation by Election Data Services, Inc. of SJR 2-G and CS/HB 1-E)	30
4.	Election Data Services, Inc.'s Evaluation of SJR 2-G and CS/HB 1-E	32
5.	Report and Recommendation of Special Master on Congressional Redistricting Plans, May 16, 1992	41
6.	Excerpts from Plaintiffs' Third and Fourth Amended Complaints	67
7.	Complaint of the United States, June 23, 1992	73
8.	Affidavit of Theodore S. Arrington, Ph.D., April 28, 1992	81
9.	Affidavit of Theodore S. Arrington, Ph.D., April 26, 1992	84
10.	Report to the Special Master by the Independent Expert Witness	99
11.	Declaration of Allan J. Lichtman, June 22, 1992	138
12.	Affidavit of Thomas B. Hofeller	161
13.	Affidavit of Dario V. Moreno (Plaintiffs' U.S. Exhibit #45)	170
14.	Declaration of Allan J. Lichtman, June 27, 1992 (Plaintiffs' U.S. Exhibit #46)	201
15.	Affidavit of Lisa R. Handley (Defendants' House Exhibit #19)	208
16.	Declaration of Allan J. Lichtman, June 30, 1992 (Plaintiffs' U.S. Exhibit #54)	213

TABLE OF CONTENTS—Continued

ITEM	Page
17. The Voting Rights Act and Redistricting in Florida (Submitted by Election Data Services, Inc.) (Plaintiffs' U.S. Exhibit #47)	220
18. Factual Information in Response to Questions Posed by a "Notice to Parties" dated April 30, 1992 (Compiled under the direction of George H. Meier, May 6, 1992)	227
19. Census Bureau Citizenship Data	233
20. Census Bureau Memorandum Re: Detailed Research Tabulations on Voting Rights	238
21. Excerpts from the Transcripts of the Congressional Redistricting Hearings, May 5, 1992-May 15, 1992	242
a. Testimony of Theodore Arrington, Tr. Vol. III	242
b. Testimony of Dario Moreno, Tr. Vol. III	252
c. Testimony of Dario Moreno, Tr. Vol. IV	261
d. Testimony of Miquel De Grandy, Tr. Vol. IV	253
e. Testimony of Lisa Handley, Tr. Vol. VI	266
f. Testimony of Ronald Weber, Tr. Vol. VII	266
g. Testimony of Susan McManus, Tr. Vol. VIII	268
h. Testimony of David Gelfand, Tr. Vol. XI	270
22. Excerpts from the Trial Transcripts, June 29, 1992-July 1, 1992	274
a. United States' Opening Statement, Tr. Vol. I	274
DeGrandy Plaintiffs' Opening Statement, Tr. Vol. I	276
b. U.S. Argument Opposing the Senate's Motion for Directed Verdict, Tr. Vol. III	280
c. Discussion of Section 5 Issues, Tr. Vol. I	280
d. Hearing on Motion to Dismiss, Tr. Vol. I	293
e. Testimony of Kimball Brace, Tr. Vol. VI	298
f. Testimony of James Burke, Tr. Vol. VII	299
g. Testimony of Miquel De Grandy, Tr. Vol. II	300

TABLE OF CONTENTS—Continued

ITEM	Page
h. Testimony of Miquel De Grandy, Tr. Vol. IV	300
i. Testimony of William DeGrove, Tr. Vol. VII	303
j. Testimony of John Guthrie, Tr. Vol. IV	318
k. Testimony of Lisa Handley, Tr. Vol. VI	345
l. Testimony of Thomas Hofeller, Tr. Vol. IV	353
m. Testimony of Allan Lichtman, Tr. Vol. III	356
n. Testimony of Allan Lichtman, Tr. Vol. III	420
o. Testimony of Willie Frank Logan, Tr. Vol. III	381
p. Testimony of Dario Moreno, Tr. Vol. II	389
q. Testimony of Leon Russell, Tr. Vol. III	424
r. Testimony of Ronald Weber, Tr. Vol. V	443
s. Testimony of Ronald Weber, Tr. Vol. VI	456
t. Testimony of Daniel Webster, Tr. Vol. VI	470
u. Closing Arguments, Tr. Vol. VIII	471

DISTRICT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1992		RECEIPT #55987
1/14	1	COMPLAINT
	3	MOTION . . . for appointment of three judge court
	4	MOTION . . . to expedite proceedings summons issued and handed to runner at counter. file reference to WS
1/20	14	DESIGNATION OF THREE-JUDGE COURT . . . Chief Judge Tjoflat cc: Rumberg and Meros
1/23	15	FIRST AMENDED COMPLAINT . . . Pltf's declaratory judgment and injunctive relief. ref. WS
1/28	18	MOTION TO DISMISS . . . deft Chiles and Smith ref. WS
2/4	27	MOTION TO DISMISS . . . Margolis and Gordon's pltf's first amended complaint and motion to vacate the order appointing a three Judge Court and Supporting memo of law. ref WS
2/5	32	MOTION TO DISMISS . . . deft's Wetherell and Wallace. ref WS
2/20	41	ORDER . . . EOD 2/20 cc: Rumberger, Meros and Waas 1. Deft's motion to dismiss (doc 18, 27 & 32) are GRANTED w/o prejudice to amend. Pltf's shall have fifteen days to amend. The then defts shall have ten days to file their respective responsive pldgs.
3/9	44	SECOND AMENDED COMPLAINT . . . pltfs for declaratory judgment and injunctive relief ref WS
3/20	46	MOTION . . . defts Wetherell and Wallace to Dismiss Second Amended complaint/motion for more definite statement. ref WS

DATE	NR.	PROCEEDINGS
	47	MOTION . . . Margolis and Gordon's to dismiss pltf's second amended Complaint and Supporting memo of law. ref WS
3/20	48	MOTION . . . Smith's, Chiles & Butterworth to dismiss second Complaint. ref WS
3/27	56	ORDER . . . (3 JUDGE PANEL) EOD 3/27 cc: Rumberger, Meros, Waas & Peters DENYING MOTIONS TO DISMISS AND SETTING EXPEDITED SCHEDULE. Defts shall file answers to 2nd amended complaint by 3/31/92. Parties to submit 6 names for special masters by 4/3/92. (see order)
3/31	61	ANSWER . . . Deft's Margolis and Gordon's to pltf's second amended complaint for declaratory judgment and injunctive relief. ref WS.
	62	MOTION TO INTERVENE . . . Simon Ferro
	64	ANSWER . . . of defts Chiles, Butterworth and Smith
	65	ANSWER . . . of House Defendants Wetherell and Wallace
4/3	68	ANSWER . . . of defts/intervenor, Simon Ferro
	70	MOTION FOR LEAVE . . . Common cause's to appear as Amicus Curiae and take certain actions.
4/7	79	MOTION . . . Humphrey, Kelly, Adams, Etc., for leave to intervene as pltfs. ref WS
	86	ORDER ON MOTION FOR GWEN HUMPHREY . . . (THREE JUDGE PANEL) EOD 4/7 cc: Rumberger, Meros, Levine, Waas, Peters, Thomson, Moffitt, White, Parker, Judge Atkins, Stafford, Hatchett, Vinson. PLDG. 79 & 80 are GRANTED.
	87	COMPLAINT . . . for injunctive and other equitable relief of Gwen Humphrey.

DATE	NR.	PROCEEDINGS
4/10	102	MOTION . . . Cuban American Bar and the coalition of Hispanic American Women for leave to appear as Amicus Curiae.
4/10	105	ORDER . . . (THREE JUDGE PANEL) EOD 4/10 cc: Thomson, Peters, Waas, Levine, Meros, Rumberger, Judge Hatchett, Vinson, Stafford, Atkins. 1. File a proposed congressional redistricting plan and a legislative reapportionment plan for Florida; 2. Review and comment, in writing, upon plans parties or intervenors file. 3. Participate in any evidentiary hearing to the extent Special Master's Report permits; 4. File objections to the Special Master's Report and 5. Participate in the May 27, 1992 hearing through the [filing] of brief. PLDG #103 is GRANTED
	109	THIRD PARTY COMPLAINT . . . 3rd party pltf's. ref. WS
	112	MOTION . . . Darryl Reaves, Corrine Brown and James T. Hargett to intervene as pltf's. ref. WS
4/13	116	ORDER . . . (THREE JUDGE PANEL) EOD 4/13 cc: Thomson, Peters, Waas, Levine, Meros, Rumberger, Burr, Lamb, Hayes, Judge Vinson, Stafford, Hatchett, Atkins Deft Motion (doc 108) DENIED. (doc 112) GRANTED. The pltf-intervenors shall abide by the March 27th scheduling order and all other orders issued by the court.

DATE	NR.	PROCEEDINGS
4/14	117	ANSWER . . . of defts Chiles, Smith and Butterworth
	119	ANSWER . . . T.K. Wetherell to complaint of intervenors Humphrey, et al. ref. WS
	120	ANSWER . . . House defts Wetherell and Wallace to Complaint of Florida State Conference of NAACP Branches, et al., copy faxed to Judges Hatchett & Vinson, delivered to Judge Stafford & overnight mailed to Judge Atkins
4/15	125	MOTION . . . House defts, to dismiss; alternatively, mo. for abstention or deferral w/memo copy delivered to: Judges Hatchett, Vinson, Stafford, Atkins & copy of mo. faxed to Judge Vinson
4/17	133	MOTION . . . of DANIEL WEBSTER, to appear as Amicus Curiae.
4/17	136	ORDER . . . (3 JP) EOD 4/17/92 Denying House defts' mo. to dismiss and implements an alternative timetable. (See Order) copy faxed to all counsel, Judges Hatchett, Vinson & Atkins.
	137	NOTICE . . . of deft Butterworth, of Section 5 Submission to the Dept. of Justice
	138	MOTION . . . of defts Chiles, Butterworth and Smiths' Motion for Partial Summary Judgment
	140	MOTION . . . of defts Margolis and Gordon, for abstention and/or Partial S/J as to Legislative redistricting. Ref. to all Judges.
	141	NOTICE . . . of filing by House defts of SJR 2G and CB/HB 1-E as their Senate, House and Congressional districting plans. (attachments in 3-separate notebooks)
	144	MOTION . . . of defts Margolis and Gordon to adopt and join House defts Motion to Dismiss,

DATE	NR.	PROCEEDINGS
		alternatively, Motion for Abstention or deferral and memo. Ref. all Judges
	146	ANSWER . . . of deft Florida AFL-CIO.
	147	MOTION . . . of AFL-CIO to intervene.
	152	ANSWER . . . of Intervenor Reddick to Complaint of Florida State Conference of NAACP Branches, et al.
	153	ANSWER . . . of intervenor Reddick to Complaint of Intervenors, Humphrey, et al.
	154	MOTION . . . to intervene by ALZO REDDICK, a Representative in the Florida Legislature.
	160	MOTION . . . of pltfs DeGrandy for Summary Judgment on Cts. 1, ii, III, IV, V, and VI of pltfs Second Amended Complaint
	168	MOTION . . . of Andy Ireland for Leave of Intervene and file plan.
4/20	170	MOTION . . . Congressman Craig T. James to appear as Amicus Curiae and take certain actions.
4/21	180	ORDER . . . (3 JP) EOD 4/21 cc: to all counsel Pldg #133 GRANTED of Daniel Webster. Pldg #134 GRANTED of Jim Bacchus.
4/21	184	MOTION . . . of George C. McGough, Patrick J. Aland, Claude E. McGeachy, Wilson Reed, James S. Miles, Warren Andrews, Walter Sanford, Winston Rushing, Keith Bailey, Ruby Padget, Joe Mangus, Mary Heaston, Barbara Sofarelli, Carmel Ceraola, William Branks, Edwin I. Ford, Jean S. Halvorsen, Duane Runyan, James S. Pitts, and Gerald R. McClelland for leave to intervene as Amicus Curiae ref.

DATE	NR.	PROCEEDINGS
4/21	187	RESPONSE . . . pltf's to defts Margolis and Gordon's Motion for abstention and/or partial summary judgment ref.
4/22	189	RESPONSE . . . House defts to motion of Alzo Reddick to Intervene.
4/22	193	ORDER . . . (3 JP) EOD 4/22 cc: all counsel on pending motion; order clarifying scheduling order of 3/27/92.
		Pldg #56 all responses to SJ Motions must be filed by 3:00 p.m. on 4/24/92.
		MOTION TO INTERVENE pldgs #147; 154; 168; 170; 179; and 184 are GRANTED.
		Defts Margolis' & Gordon's motion to adopt and join House defts' motion to dismiss (doc 144) is GRANTED.
		The clk shall copy the deft Margolis & Gordon with the order (doc 136) denying the House defts motion to dismiss
		cc: of pldg #136 mailed to Atty Zack at his Talla. address
	194	RESPONSE . . . pltf's to defts Chiles, Butterworth and Smith's motion for partial summary judgment. ref.
	201	ANSWER . . . defts' Margolis and Gordon, Answer to pltf's complaint
4/24	228	RESPONSE IN OPPOSITION . . . defts Chiles, Butterworth and Smith to pltf's motion for summary judgment on counts V and VI of pltf's second amended complaint.
4/24	246	ORDER . . . (3 JP) EOD 4/24 cc: *FAXED* to all counsel
		House defts' Emergency motion to Modify Scheduling order on Redistricting Hearings is DENIED.

DATE	NR.	PROCEEDINGS
	248	RESPONSE . . . defts' Response to pltf's motion for summary judgment.
5/11	363	MOTION . . . Barr, USA to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which can be granted.
5/12	387	ORDER . . . (3 JP) EOD 5/13 cc: *FAXED* to counsel & mailed
		Further proceedings as to state legislative reapportionment are stayed until 5/27/92.
5/15	390	APPLICATION . . . Humphrey for preliminary injunction against implementation of SJR 2G pursuant to Section 5 of voting rights act.
5/18	394	VOLUME I . . . *TRANSCRIPT* of first day of Reapportionment hearing held May 4, 1992
5/18	395	VOLUME II . . . *TRANSCRIPT* of morning and afternoon session of second day of reapportionment hearings May 5, 1992
	396	VOLUME III . . . *TRANSCRIPT* of evening session of second day of trial held May 5, 1992
	397	VOLUME IV . . . *TRANSCRIPT* of morning and afternoon session of third day of reapportionment hearing held May 6, 1992.
	398	VOLUME V . . . *TRANSCRIPT* of evening session of third day of reapportionment hearings May 18, 1992
	399	VOLUME VI . . . *TRANSCRIPT* of morning and afternoon session of fourth day of reapportionment hearings held May 7, 1992
	400	VOLUME VII . . . *TRANSCRIPT* of evening session of third day of reapoprtionment hearings held May 7, 1992
	401	VOLUME IX . . . *TRANSCRIPT* of afternoon session of fifth day of reapportionment hearings held May 8, 1992

DATE	NR.	PROCEEDINGS
	402	VOLUME VIII . . . *TRANSCRIPT* of morning session of fifth day of reapportionment hearings held May 8, 1992
5/18	403	VOLUME X . . . *TRANSCRIPT* of evening session of fifth day of reapportionment hearing held May 8, 1992
	409	VOLUME XI . . . *TRANSCRIPT* of sixth day of reapportionment hearings held May 15, 1992
5/27	435	RESPONSE . . . pltf's DeGrandy to motion to dismiss
5/27	436	ORDER . . . (3 JP) EOD 5/27 cc: all counsel of records Pldg #363 GRANTED; PLDG #390 DENIED; Pldg #391 DENIED; Pldg #416 DENIED; This court will retain jurisdiction, and will monitor further activities regarding legislative redistricting and Dept. of Justice review. Pldg #426 is DENIED no further action is necessary on doc 414.
5/29	438	OPINION . . . (Hatchett, Stafford, Vinson) Ordered the State of Florida to conduct the 1992 congressional elections and congressional elections thereafter in districts as shown by plan 308, which this court deems the "1992 Florida Redistricting Plan" With Specially Concurring Opinion of J. Vinson. (w/attachments)
5/29	439	JUDGMENT . . . (Hatchett, Stafford, Vinson) ORDERED: 1. The State of Florida's current congressional districts, drawn in 1982, violate the pltfs rights and the rights of all Florida citizens because the districts fail to meet the requirements of Article I section 2 of the U.S. Constitution, the

DATE	NR.	PROCEEDINGS
		Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution, the one-person-one-vote Principle and the Voting Rights Act of 1965, as amended. 2. The court adopts plan 308, the 1992 Florida Redistricting Plan, as the plan to be utilized in the 1992 Florida congressional elections and in Florida congressional elections thereafter. 3. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall: (a) conduct congressional election in 1992 in accordance with the redistricting plan this court has adopted called "The 1992 Florida Redistricting Plan," a map and written description of which are attached to the Judgment. (b) Conduct congressional elections in years after 1992 in accordance with the 1992 Florida Redistricting Plan.
6/18	448	MOTION . . . pltfs for leave to file third amended complaint and memorandum of law in support thereof.
	450	MOTION . . . to intervene and for declaratory and injunctive relief by Florida State Assoc. of Supv. of Elections, Inc. ref WS
6/23	468	DECLARATION . . . of Allan J. Litchman
	471	AFFIDAVIT . . . of Dario V. Moreno
	472	AFFIDAVIT . . . of Thomas B. Hoeffler
6/25	495	NOTICE OF FILING . . . deft's Florida Supreme Court order and Motion to Stay.
	499	MOTION . . . deft's to dismiss/motion for summary judgment as to pltfs' third amended com-

DATE	NR.	PROCEEDINGS
		plaint for declaratory judgment and injunctive relief with memo.
6/25	502	NOTICE OF ADOPTION . . . Senate Defendants of House defts motion to dismiss, motion for summary judgment as to pltf's third amended complaint for declaratory judgment and injunctive relief.
6/26	506	MOTION . . . pltf's for leave to file fourth amended complaint and memorandum of law in support thereof.
6/27	509	MOTION . . . pltfs for leave to file voluntary dismissal, without prejudice, with respect only to certain section 2 challenges to certain districts in the Florida House of Representatives Redistricting Plan.
6/29	513	ANSWER . . . Senate deft's to fourth amended complaint for declaratory judgment and injunctive relief.
	514	MOTION . . . Senate deft's to refer the modification of SJR-2G, as modified by the Florida Supreme Court, to the Florida Supreme Court, should the court conclude it violates section 2 of the Voting Rights Act.
	516	ANSWER . . . deft Chiles, Butterworth & Smith to third amended complaint.
	521	ANSWER . . . of defts Margolis and Gordon.
	524	AFFIDAVIT . . . of William DeGrove.
	525	ANSWER . . . House defts Wetherell and Wallace to pltf's third amended complaint.
	526	ANSWER . . . defts Wetherell and Wallace to complaint of USA.
7/1	541	AFFIDAVIT . . . of William M. DeGrove.
	543	ANSWER . . . defts State of Florida, et al.

DATE	NR.	PROCEEDINGS
	546	AFFIDAVIT . . . of Steven A. Geller.
	547	AFFIDAVIT . . . of Robert M. Levy.
7/1	548	CONSENT JUDGMENT . . . EOD 7/1 cc: to all counsel of records COB 1992 PAGE
7/1	549	MINUTES . . . of 3-Judge Panel Proceedings on legislative Redistricting. —Court announced ruling Against all plaintiffs in the Dade County (Senate) portion of proceedings. —Court adopts the 'Modified DeGrandy Plan' of the (House) portion of proceedings re: Dade County. Written order and opinion to follow. Judgment to be entered. C/R Paul Rayborn, Lisa Jones, Judy Ellan, Cathy Webster, and Beth White
7/2	550	EMERGENCY MOTION . . . Executive defts for reconsideration.
7/2	551	RESPONSE IN OPPOSITION . . . DeGrandy to Emergency motion for reconsideration.
	553	JUDGMENT . . . (3-Judge Panel) cc: to all counsel (Senate Joint Resolution 2-G as modified by the Florida Supreme Court on 6/25/92.) (see judgment)
	554	JUDGMENT . . . (3-Judge Panel) cc: to all counsel (Florida's House of Representatives joint resolution 2-G as validated by the Florida Supreme Court on 5/13/92.) (see judgment)
	555	ORDER . . . (3-Judge Panel) cc: to all counsel The Executive defts Emergency Motion for Reconsideration #550 is DENIED.
	556	EMERGENCY MOTION . . . House deft's for reconsideration, rehearing, relief from order with memorandum of law

DATE	NR.	PROCEEDINGS
	557	AFFIDAVIT . . . of Kimball W. Brace
	558	AFFIDAVIT . . . of George H. Meier
7/6	559	SUPPLEMENT TO THE JUDGMENT . . . (3-Judge Panel) EOD 7/6 cc: to all counsel CIV. ORDER BK 1992 PP 150-357 Filed herein is a map and written description of the 1992 Florida House Plan adopted by this court on 7/1/92 and referred to in the judgment dated 7/2/92 (doc. 554).
	560	ORDER . . . (3-Judge Panel) EOD 7/6 cc: all counsel. Pldg #556 is DENIED.
7/6	561	AMENDED EMERGENCY MOTION . . . House defts for reconsideration, rehearing, relief from order, and for stay with memorandum of law.
7/7	562	ORDER . . . Supreme Court of the United States denying application for stay.
	563	TRANSCRIPT . . . VOLUME I of proceeding held before 3-Judge Panel on 6/26/92.
	564	TRANSCRIPT . . . VOLUME II of proceeding held before 3-Judge Panel on 6/26/92.
	565	TRANSCRIPT . . . VOLUME III of proceeding held before 3-Judge Panel on 6/27/92.
	566	TRANSCRIPT . . . VOLUME IV of proceeding held before 3-Judge Panel on 6/29/92.
	567	TRANSCRIPT . . . VOLUME V of proceedings held before 3-Judge Panel on 6/30/92.
	568	TRANSCRIPT . . . Volume VI of proceeding held before 3-Judge Panel on 6/30/92.
	569	TRANSCRIPT . . . VOLUME VII of proceeding held before 3-Judge Panel on 7/1/92.
	570	TRANSCRIPT . . . VOLUME VIII of proceedings held before 3-Judge Panel on 7/1/92.

DATE	NR.	PROCEEDINGS
7/9	571	ORDER . . . (3-Judge Panel) EOD 7/9 cc: to all counsel. The House defts' amended emergency motion for reconsideration, rehearing, relief from order and for stay (doc 561) is DENIED.
7/16	577	ORDER . . . (3-Judge Panel) EOD 7/17 cc: to all counsel 1. The Emergency Motion for adoption of an interim plan of Apportionment and the request for Oral Argument thereon are hereby DENIED. 2. Qualification for the Florida Senate and House of Representatives shall continue under the plan adopted in this court's judgment entered on 7/2/92.
7/17	578	ORDER . . . (3-Judge Panel) EOD 7/17 cc: all counsel With respect to Florida's House of Representatives Districts we adopted the modified DeGrandy House of Representative Plan, Plan 268, as the court's plan and also impose that plan.
7/24	594	APPEAL . . . NOTICE OF to U.S. Supreme Court of 5/29/92 judgment by defts. Wetherell and Wallace.
7/24	595	APPEAL . . . NOTICE OF to U.S. Supreme Court of 7/2/92 judgment by defts. Wetherell and Wallace.
7/31	601	NOTICE OF APPEAL . . . USA
8/31	610	MOTION . . . DEGRANDY for attys' fees and costs and memorandum in support thereof
	611	MOTION . . . Humphrey for an award of attys' fees and litigation expenses

DATE	NR.	PROCEEDINGS
9/4	619	MOTION . . . Reaves, Brown, Hargrett for an award of atty's fees and litigation expenses
9/23	625	SUPPLEMENTAL MOTION . . . REAVES, BROWN, HARGRETT for an award of atty's fees and litigation expenses on behalf of Hunter & Vanture, P.A.
9/29	627	MOTION . . . NAACP for atty's fees and litigation expenses & costs with memorandum of law in support
10/7	630	NOTICE . . . deft Waiver of Appeal of this Court's Judgment with respect to congressional districts

[Excerpts from Stipulated Facts Submitted to the Special Master in the Congressional Districting Proceeding, April 3, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No.: 92-40015WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

vs.

T.K. WETHERELL, in his official capacity, *et al.*,
Defendants.

STIPULATED FACTS

Without waiving the right of the parties to object to the relevancy, materiality, probative value, or admissibility of these facts, plaintiffs, Miguel De Grandy, et al., and Defendants, T. K. Wetherell, et al., submit this stipulation of facts pursuant to this Court's order of March 27, 1992:

* * * *

(All defendants except Gordon and Margolis stipulate to paragraphs 23 and 51-92, contingent upon Plaintiffs supplying primary governmental source references supporting these paragraphs within seven working days).

23. In addition, over the last 15 years, the number of voters registering Republican has increased from 27.84% to 41.07% of registered voters, while the number of Democrats has decreased from 67.24% to 51.6%.

* * * *

31. According to the 1990 federal decennial census, the population of the State of Florida is 12,937,926, an increase of 3,213,602 persons since the 1980 decennial census. This increase in population entitles Florida to an additional four members in the United States House of Representatives, increasing the size of the State's congressional delegation from 19 to 23 members, pursuant to 2 U.S.C. § 2.

* * * *

50. In its analysis of the 1980 riots in Liberty City, the U.S. Commission on Civil Rights wrote in 1982 that

> Many Black Miamians are contributing to the progress of their communities and the city as a whole. Black support for a rapid transit system in a 1978 referendum made the project possible. The Black Miami-Dade Chamber of Commerce, albeit, with limited success, has coordinated efforts with the Greater Miami Chamber of Commerce in two projects designed to increase the number of black businesses in Dade County. But the Black community in Miami has neither the size nor wealth that commands political power and accountability in Miami. Acting alone, it cannot control or improve the circumstances in which they live.

Confronting Racial Isolation in Miami, U.S. Commission on Civil Rights, (Washington, 1982), p. 314 (Hereinafter referred to as "Racial Isolation").

51. The U.S. Commission on Civil Rights concluded its report by saying that

> Unless a racially conscious effort is made to overcome the social and economic disadvantages imposed on Black Miamians and to offer them the opportunity to develop a prosperous community again, the present sense of alienation and frustration will continue to pervade Black life in Dade County.

Racial Isolation, p. vii.

52. Dade County's school system was found to be segregated in the 1970's and continues to operate under federal court supervision. Overall, African-Americans and Hispanic students continue to score significantly lower than non-Latin white students. In addition, African-Americans and Hispanics have lower levels of graduation from high school than do non-Latin whites.

53. Overall, Hispanics and African-Americans have lower levels of income than do non-Hispanic whites according to a study published by Metropolitan Dade County. These substantial economic disparities continue to disadvantage African-Americans and Hispanic political participation.

54. Blacks in Dade County constitute a sufficiently large and geographically compact minority group to constitute a majority in a single-member congressional district.

55. Hispanics in Dade County constitute a sufficiently large and geographically compact minority group to constitute a majority in two single-member congressional districts.

56. The following table accurately summarizes the racial and ethnic demographics of the population of Dade County, Florida from 1960 through 1990.

57. The following table accurately summarizes the racial and ethnic demographics of the voting age population of Dade County, Florida from 1960 through 1990.

Year	Total VAP	Hispanic VAP	Hispanic VAP%	Non Hispanic Black VAP	Non Hispanic Black VAP%	Non Hispanic White VAP	Non Hispanic White VAP%
1960	642,598	25,786	4.01%	79,706	12.40%	537,106	83.58%
1970	897,136	202,748	22.60%	105,914	11.81%	588,474	65.59%
1980	1,233,545	439,429	35.62%	169,582	13.75%	624,534	50.63%
1990	1,469,084	741,846	50.50%	239,955	16.33%	487,283	33.17%

58. The table which is attached hereto as Exhibit 2 accurately reflects non-Hispanic Black voter registration in Dade County from 1960 to 1991 based on records kept by the Dade County Division of Elections.

59. Between the 1980 and 1990 Census, Dade County's Hispanic population grew by 64% and the non-Hispanic Black population grew by 37%, while the non-Hispanic White population decreased by 21%.

60. During the period between 1980 and 1990, Cuban Americans comprised a smaller percentage of Dade's Hispanic population. During this period the number of Cuban Americans increased by 157,000 people or 38.5%. During the same period other Hispanics (*i.e.*, not Cuban, not Puerto Rican, not Mexican), primarily Nicaraguan and Colombian, increased by 178,000 people or 150%.

61. Dade County was created by an act of the Florida Legislative Council in 1836.

62. In 1957, the voters of Dade County adopted a Home Rule Charter, providing for the election of five members of the County Commission from single-member districts, five by the voters at-large, and one representative from each municipality with more than a 60,000 population. In 1957, the City of Miami was the only municipality that qualified to have its own commissioner. After the 1960 Census, Miami, Miami Beach and Hialeah qualified to have municipally elected representatives on the County Commission.

63. By 1963, the County Commission was comprised of 13 members; five elected from districts, five at-large, and one from each of the cities of Miami, Hialeah, and Miami Beach.

64. In 1964, the Home Rule Charter was amended, replacing the mixed system of electing County Commissioners with the present at-large system. Under the present system, eight commissioners, elected by the voters at-large, would run from residence districts. In addition, the position of County Mayor was created. The Mayor does not enjoy any Charter designated authority to separate him from any of the other commissioners, except that he is required to preside at commission meetings and must deliver an annual State of the County Address.

65. A total of five Blacks have served on the County Commission. The first Black to serve on the County Commission, Earl J. Carroll, was elected in 1968. Carroll was suspended by the Governor and John A. Cavalier and Neal Adams were named to serve during Carroll's suspension. Cavalier is white and Adams is Black.[1] Carroll and three white commissioners were recalled by the voters on March 14, 1972. Edward T. Graham, a Black, was appointed by the County Commission in April 1972 to replace Carroll and subsequently won election for the seat in the fall 1972 election. Graham was suspended by the Governor in May 1975 and Neal Adams was appointed to finish Graham's term. Adams was elected to a two year term in October 1976 and reelected in October 1978, but was suspended by the Governor in November 1979. Barbara Carey, who is Black, was appointed by the Governor in December 1979 to replace Adams and served until October 1990, when she was defeated by Arthur Teele, who is Black, in a September 1990 primary.

66. The Black candidates elected to the County Commission from 1968-1986 received the majority of the Black votes cast, and won majority support in all of the heavily Black precincts (precincts in which Blacks comprised at least 85% of the registered voters), except in the 1978 election of Neal Adams who won 33 of the 36 Black precincts in existence at the time of the election.

---

[1] Adams served during Carroll's first suspension, from May through July 1969, and Cavalier served during Carroll's second suspension from June to July 1970. Several white commissioners were also suspended at this time.

67. In September 1990, Sherman Winn, a white candidate, was elected from residence District 4 with the support of the majority of Black voters, in a race against two Black candidates and a white candidate. Sherman Winn won majority support in 49 of 52 heavily Black precincts in existence at the time of the election.

68. Since 1968, there have been a total of thirteen (13) races for the County Commission involved one or more Black candidates. The candidates who received the majority of Black votes were elected in seven (7) races: Earl Carroll in 1968, Edward T. Graham in 1972, Neal Adams in October 1976 and October 1978, Barbara Carey in 1982 and 1986, and Sherman Winn in 1990. All of the Black candidates who were elected received in excess of 60% of the Black votes cast. The vote for the Black candidates who were not elected are as follows:

a. In 1990, Barbara Casey received 46.9% of the total vote and lost a race for District 3, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

b. In 1990, Betty Ferguson lost a runoff race for District 1, receiving 48.39% of the total vote, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

c. In 1986, Betty Ferguson lost a runoff race for District 1, receiving 46.6% of the total vote, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

d. In 1982, Akbar Muhammad lost a primary race for District 1, receiving 15.7% of the total vote, and received in excess of 60% of the Black votes cast won the majority vote in all heavily black precincts at the time of election.

e. In 1976, Clinton Brown lost a runoff race for District 1, receiving 37.1% of the total vote, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election.

f. In 1974, Tom Washington lost a primary race for County Mayor, receiving 7.1% of the total vote, and received the majority of the Black votes cast.

69. Edward T. Graham, Neal Adams, and Barbara Carey were first appointed to the County Commission prior to their subsequent elections.

70. The information which is contained in Exhibit 3 attached hereto accurately portrays the County Commission and the Dade County School Board elections involving Black candidates.

71. In September 1981, the Board of County Commissioners appointed Jorge Valdes, a Hispanic, to the County Commission to replace Bill Oliver, who resigned to run for state office.

72. At the time of his election in 1982 and 1986, Jorge Valdes received the majority of Hispanic votes. In 1990, Jorge Valdes was defeated by Alex Penelas, a Hispanic.

73. Only two Hispancis, Valdes and Penelas, have served on the County Commission.

74. The informaiton which is contained in Exhibit 3 attached hereto accurately portrays the County Commission elections and School Board elections involving Hispanic candidates.

75. Since 1970, the Dade County School Board has had three Hispanic members, Alfredo Duran, Paul Cejas, and Rosa Castro-Feinberg, and two Black members, Joyce Knox and William Turner. Alfredo Duran was

appointed to the School Board in October 1973 to replace Crutcher Harrison upon her resignation and served until November 1974. Duran was defeated by Linton Tyler in the September 1974 Democratic primary. Paul Cejas was appointed in March 1980 and elected to a full term in 1984. Rosa Castro-Feinberg was appointed in September 1986 to replace Kathleen Magrath upon her resignation and was elected in 1988 to a four year term. William Turner was first elected to the School Board in 1970 and reelected in 1974. Turner lost a Democratic runoff to Joyce H. Knox in 1978, and Knox was elected that same year. Turner was subsequently reelected in 1982, 1986 and 1990.[2]

76. Blacks in Dade County experience depressed education, employment, health, and housing levels relative to the rest of the population in Dade County.

77. The charts attached hereto as Composite Exhibit 6 accurately reflect the racial and ethnic makeup of Dade County employees as of September 30, 1991.

78. According to the survey attached hereto as Exhibit 1, as of May 1991, voting age Hispanics in Dade County had attained a citizenship level of 61.1%. Under Florida law these Hispanic citizens are qualified to become voters. Removing the 38.9% of the voting age Hispanics in Dade County who are not citizens from the pool of eligible voters reduces the share of citizen voting age Hispanics to an electoral minority.

---

[2] The School Board of Dade County, Florida is the governing body of the Dade County Public Schools. The Board is composed of seven members, all elected by the electors of the County at-large with five members running from residency districts and two who may reside anywhere in the County. The Board is presently comprised of Chairperson Janet McAliley, Co-Chairperson Betsy Kaplan and members Robert Renick, William Turner, Dr. Michael Krop, Holmes Braddock, and Rosa Castro-Feinberg. Castro-Feinberg is Hispanic and Turner is Black. Election to the School Board is partisan with four year terms and staggered election years.

79. As of the book closing for the November 6, 1990 election, the records of the Dade County Division of Elections contained the following breakdown of registered voters by race and ethnicity:

Non-Latin Whites	**342,853**	**50.88%**
Non-Latin Black	**130,519**	**19.37%**
White Hispanic	**187,393**	**27.81%**
Black Hispanic	**3,262**	**0.48%**
Other	**9,811**	**1.46%**
Total	**673,838**	**100.00%**

80. Each of the three major population segments of Dade County is heterogeneous, composed of distinct groupings. The Hispanic population is comprised of significant populations of Cubans, Nicaraguans, Puerto Ricans, and Colombians.

81. A significant segment of the Non-Hispanic Black population is Haitian.

82. The non-Hispanic White population spans from the rural farm population of southwest Dade to the condominium dwellers of Northeast Dade.

83. Since 1976, there have been a total of 5 primary races for the County Commission involving one or more Black candidates who received the majority support of Black voters, but who were forced into a runoff. The vote for these Black candidates who were forced into a runoff are as follows:

a. In 1976, Clinton Brown was forced into a runoff race for District 1, receiving 23.0% of the total vote in the primary and received in excess of 60% of the Black votes cast and won the majority of the votes cast in all heavily Black precincts at the time of election. Clinton Brown lost in the runoff.

b. In 1976, Neal Adams was forced into a runoff race for District 3, receiving 42.3% of the total

vote in the primary and won the majority vote in all heavily black precincts at the time of election. Adams won the runoff.

c. In 1978, Neal Adams was forced into a runoff race for District 3, receiving 42.7% of the total vote in the primary, and won the majority vote in all heavily black precincts at the time of election. Adams won the runoff.

d. In 1986, Betty Ferguson was forced into a runoff race for District 1, receiving 39.7% of the total vote in the primary, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election. Ferguson lost the runoff.

e. In 1990, Betty Ferguson was forced into a runoff race for District 1, receiving 38.4% of the total vote in the primary, and received in excess of 60% of the Black votes cast and won the majority vote in all heavily black precincts at the time of election. Ferguson lost the runoff.

84. No Black candidates has been elected to the County Commission from any residence district other than from residence district 3.

85. No Hispanic candidate has been elected to the County Commission from any residence district other than from residence district 2.

86. Dade County has experienced riots in 1980, 1982, 1984, and 1989. In each instance, the riots involved events associated with the killing of Black men by non-Hispanic White and Hispanic police officers.

87. The following is a list of county wide elected positions in Dade County:

Office	Number of Positions
Dade County Commission	
County Mayor	1
County Commissioners	8
Dade County School Board	7
Dade State Attorney	1
Dade County Fire Board	5
Dade Public Defender	1
Clerk of the Circuit Court	1
Circuit Court Judges	68
County Court Judges	33
TOTAL	125

88. To date, no Black or Hispanic has been elected to the offices of State Attorney or Public Defender.

89. The Office of Clerk of the Circuit Court was held from 1972 until 1990 by Richard P. Brinker, a non-Latin White. Prior to 1972, the office of the Clerk of the Circuit Court had been held by a non-Latin White. In 1990, upon the resignation of Brinker, Governor Bob Martinez appointed Tony Coterello, a Hispanic, as Clerk of the Circuit Court. Coterello was defeated in November 1990 by Marshall Ader, a non-Latin White.

90. Judges elected and appointed in Dade County on both the circuit and county level have also been traditionally non-Latin White. Of the 68 circuit court judges presently sitting, four are Hispanic and two are Black. In addition, there are 33 county judges. Of those, only two are Black and two are Hispanic. Each of these 10 minority jurists were initially appointed to the bench by either the Dade County or Eleventh Circuit Judicial Nominating Commissions.

91. The Dade County Fire Board was created by a 1986 amendment to the Dade County Charter. Members of the Fire Board are elected at-large, with the top

five vote recipients winning a seat on the Board. Its five members have included one Hispanic from the first election of members in 1986. There have been three Hispanic candidates and no Black candidates. No Black has served on the Fire Board.

92. In addition, a survey of the municipalities in Dade County as of March 1991 revealed the following ethnic and racial breakdown of city commissioners.

Municipality	Total	NLW	Hispanic	Black
Bay Harbour	5	5	0	0
Bay Harbor Islands	7	7	0	0
Biscayne Park	5	5	0	0
Coral Gables	5	5	0	0
El Portal	7	6	0	1
Florida City	5	1	0	4
Golden Beach	5	5	0	0
Hialeah	7	1	6	0
Hialeah Gardens	5	3	2	0
Homestead	7	4	2	1
Indian Creek	5	5	0	0
Medley	5	5	0	0
Miami	5	1	3	1
Miami Beach	7	7	0	0
Miami Shores	5	5	0	0
Miami Springs	5	5	0	0
North Bay Village	5	5	0	0
North Miami	5	5	0	0
North Miami Beach	7	7	0	0
Opa Locka	5	0	0	5
South Miami	5	4	0	1
Surfside	5	3	2	0
Sweetwater	7	1	6	0
Virginia Gardens	5	2	3	0
West Miami	5	1	4	0
TOTAL	139	98	28	13

93. There are presently 21 members of the Dade delegation to the Florida House of Representatives. From at least 1885 to the mid 1960s the Florida House was apportioned by county rather than by population. During this period, no Blacks or Hispanics served in the Florida House from Dade County. From the mid 1960s to 1982, members of the Florida House were elected from multi-member districts, with as many as six representatives elected from a large geographic multi-member district. During that period no Hispanics were elected and two Blacks were elected from Dade County. In 1982, in a special election to fill an empty seat, Roberto Casas was elected as the first Cuban representative from Miami. In 1982, the Florida House adopted a single-member district system of electing representatives. The racial and ethnic breakdown of the present 21-member Dade House delegation are as follows:

District	Name	Race or Ethnicity
100	Ronald A. Silver	Non Latin White
101	Michael Abrams	Non Latin White
102	Elaine Gordon	Non Latin White
103	Michael Friedman	Non Latin White
104	Elaine Bloom	Non Latin White
105	Alberto Gutman	Hispanic
106	Darryl Reaves	Black
107	James Burke	Black
108	Willie Logan, Jr.	Black
109	Luis Rojas	Hispanic
110	Miguel De Grandy	Hispanic
111	Rodolfo Garcia	Hispanic
112	Carlos L. Valdes	Hispanic
113	Luis C. Morse	Hispanic
114	Bruce Hoffman	Non Latin White
115	Marlo Diaz-Balart	Hispanic
116	Art Simon	Non Latin White
117	Susan Guber	Non Latin White
118	Darryl Jones	Black
119	John Cosgrove	Non Latin White
120	Ron Saunders	Non Latin White

94. There are presently seven members of the Dade delegation to the Florida Senate. From at least 1885 to the mid 1960s, the Senate, like the Florida House, was apportioned by county rather than by population. During this period, no Blacks or Hispanics served in the Senate from Dade County. From the mid 1960s to 1982, members of the Florida House were elected from multi-member districts, with as many as three senators elected from a large geographic district. During that period no Hispanics or Blacks had been elected from Dade County. In 1982, the Florida Senate adopted a single-member district system of electing senators. The racial and ethnic breakdown of the present 7 member Dade Senate delegation are as follows:

District	Name	Race or Ethnicity
33	Roberto Casas	Hispanic
34	Lincoln Diaz-Balart	Hispanic
35	Jack D. Gordon	Non Latin White
36	Carrie Meek	Black
37	Gwen Margolis	Non Latin White
39	Lawrence Plummer	Non Latin White
40	Javier Souto	Hispanic

95. The Dade County Supervisor of Elections defines Hispanics based on place of birth outside the United States in Hispanic nations. The United States Census defines Hispanics based on self-identification.

96. During the Special Apportionment Session on Thursday, April 2, 1992, Senator Ander Crenshaw moved the Senate recess until 1:30 p.m., Monday April 6, 1992. Defendants Gordon and Margolis voted against this motion, but it passed the Senate by a vote of 20-19. A copy of the official vote tally from the Secretary of the Senate is set forth below:

Yeas—20		Nays—19	NV—1
Y Bankhead	Y Diaz-Balart	Y Johnson	Y Plummer
Y Beard	Y Dudley	N Kirkpatrick	Y Scott
Y Bruner	N Forman	Y Kiser	Y Souto
Y Burt	N Gardner	N Kurth	N Thomas
Y Casas	N Girardeau	Y Langley	N Thurman
N Childers	N Gordon	N Malchon	N Walker
Y Crenshaw	Y Grant	CHR Margolis	N Weinstein
Y Crotty	Y Grizzle	Y McKay	N Weinstock
N Dantzler	N Jenne	— Meek	N Wexler
N Davis	Y Jennings	Y Myers	N Yancey
			N Mr. President

In the Chair—Margolis

The parties agree to attempt to stipulate to additional facts.

DISPUTED FACTS

All facts not stipulated herein are disputed.

DATED this 3rd day of April, 1992.

Respectfully submitted,

/s/ George L. Waas
GEORGE L. WAAS
Florida Bar #0129967

Assistant Attorney General
Suite 1501
The Capitol
Tallahassee, Florida 32301
(904) 488-1573

Attorneys for Defendants, Chiles, Butterworth and Smith

/s/ George N. Meros, Jr.
E. THOM RUMBERGER
Florida Bar #0069480

DANIEL J. GERBER
Florida Bar #0764957
GEORGE N. MEROS, JR.
Florida Bar #0263321
RUMBERGER, KIRK & CALDWELL
Post Office Box 10507
Tallahassee, Florida 32302
(904) 222-6550

Attorneys for Plaintiffs

/s/ Illegible
STEPHEN N. ZACK
Florida Bar #0145215
Attorney At Law
Suite 3300
One Centrust Financial Center
100 Southeast Second St.
Miami, Florida 33131
(305) 539-8400

Attorneys for Defendants, Margolis and Gordon

/s/ James Peters
JAMES PETERS
Florida Bar #
Attorney At Law
Suite 500
Barnett Bank Building
315 South Calhoun Street
Tallahassee, Florida 32301
(904) 681-3233

Attorneys for Defendants, Wetherell and Wallace

HOUSE DEFENDANT'S EXHIBIT 7

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,

and

GWEN HUMPHREY, *et al.*,
Intervenors,

-vs-

T. K. WETHERELL, in his official capacity, *et al.*,
Defendants,

T. K. WETHERELL, in his official capacity, *et al.*,
Third Party Plaintiffs,

-vs-

WILLIAM P. BARR, as Attorney General of the United States of America,
Third Party Defendant.

Case No. 92-40131-WS

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,
Plaintiffs,

-vs-

LAWTON CHILES, in his official capacity, *et al.*,
Defendants.

NOTICE OF FILING AND SERVICE

The House Defendants here notice the filing of the evaluation by Election Date Services, Inc. of SJR 2-G and CS/HB 1-E.

Respectfully submitted,

KEVIN X. CROWLEY
Fla. Bar #0253286

/s/ James A. Peters
JAMES A. PETERS
Fla. Bar #0230944

COBB, COLE & BELL
315 S. Calhoun Street—Suite 500
Tallahassee, Florida 32301
(904) 681-3233
Counsel for House Defendants

ELECTION
DATA
SERVICES
INC.

Election Data Services, Inc. has been retained by the Florida House of Representatives Committee on Reapportionment to evaluate redistricting plans passed by the House: the state house plan in SJR 2-G and the congressional plan in CB/HB 1-E. Specifically, we have been asked to evaluate the two redistricting plans with regard to population deviations and recognition of minority voting strength.

One Person, One Vote

The congressional plan has a total deviation of 9 persons, for an overall percentage deviation of .0000159. The smallest deviation possible for the state is .0000017. The difference is .0000142, which is insignificant statistically.

SJR 2-G creates a state house plan with an overall percentage deviation of 1.99%. Furthermore, the deviations from ideal are attributable to the reported House of Representaitves practice of compensating for the otherwise unadjusted net undercount of minorities in the U.S. Census [1] by overpopulating majority white districts by 0.5 percent while underpopulating minority districts by between 0.75 to 1.5 percent.

Recognition of Minority Voting Strength

In order to determine if the state house and congressional redistricting plans passed by the House of Represenatives recognize minority voting strength in the state of Florida, it is first necessary to locate sufficiently large concentrations of minority populations to create effective

[1] See Final Decision, Vol. 56, *Federal Register*, #140, p. 33582.

minority districts. In Florida, Hispanics are sufficiently concentrated to create districts with significant Hispanic populations only in Dade County; blacks are concentrated in large enough numbers to create districts with significant black populations in Broward, Dade, Duval, Hillsborough, Orange and Pinellas Counties. Once districts with significant minority populations have been identified, an analysis must be conducted to determine the number of effective minority districts created by a plan. Effective minority districts are districts in which it is very likely that a minority-preferred candidate will win.

The following standard techniques were used to determine if a district provides minorities with an equal opportunity to elect candidates of their choice: 1) recompiling past precinct-level election returns into the proposed district boundaries to determine if minority-preferred candidates would have won in the new districts; 2) calculating the percentage minority voting age population needed to equalize white and minority turnout (given the differences in turnout rates between the groups); and 3) analyzing voting patterns by race to determine if minority groups voted cohesively and if we can expect any white crossover voting for minority-preferred candidates.

The analysis of all districts with minority populations over 30% black or Hispanic indicates that the congressional plan (CB/HB 1-E) has two effective black districts (congressional districts 20 and 15), an effective Hispanic district (congressional district 17) and a second Hispanic district that will probably elect a Hispanic-preferred candidate to office (congressional district 18). Table 1 lists all congressional districts with minority populations over 30% and identifies those classified as effective by an asterisk.

Table 1: Congressional Districts Over 30% Minority
CB/HB 1-E

Majority Black Districts

District	% Black Population	(% Non-Hisp. Black Pop.)	% Black VAP	(% Non-Hisp. Black VAP)
*20	60.19	(57.4)	55.3	(52.6)

Districts Between 30% and 50% Black Population

*15	49.96	(48.5)	44.3	(42.9)
3	36.89	(36.6)	33.3	(33.0)

Majority Hispanic Districts

District	% Hispanic Population	% Hispanic VAP
*17	64.75	65.1
18	63.83	64.8

This congressional plan will produce an increase—from 1 to at least 3 (and probably 4)—in the number of districts that elect minority-preferred candidates to office.

The state house plan (SJR 2-G) has a total of 15 effective black districts (all majority black districts plus house districts 23 and 118) and 9 effective Hispanic districts (all majority Hispanic districts) as well as another Hispanic district that will probably elect a Hispanic-preferred candidate to office (house district 58). Table 2 lists all state house districts with minority populations over 30% and identifies those classified as effective by an asterisk.

Table 2: State House Districts Over 30% Minority
SJR 2-G

Majority Black Districts

District	% Black Population	(% Non-Hisp. Black Pop.)	% Black VAP	(% Non-Hisp. Black VAP)
* 8	51.6	(51.3)	46.0	(45.8)
* 14	56.1	(55.7)	54.0	(53.7)
* 15	56.7	(56.4)	51.2	(50.9)
* 39	55.4	(54.3)	50.2	(49.2)
* 55	52.8	(52.1)	46.9	(46.4)
* 59	56.9	(55.7)	52.0	(50.9)
* 84	58.6	(57.4)	53.2	(52.0)
* 93	57.3	(55.6)	50.1	(48.6)
* 94	57.1	(55.8)	50.2	(48.9)
*103	62.0	(59.5)	58.2	(55.7)
*104	58.7	(56.4)	53.1	(51.0)
*108	66.2	(62.8)	60.5	(57.2)
*109	63.0	(59.6)	58.8	(55.2)

Districts Between 30% and 50% Black Population

District	% Black Population	(% Non-Hisp. Black Pop.)	% Black VAP	(% Non-Hisp. Black VAP)
3	30.0	(29.9)	26.0	(25.9)
* 23	34.0	(33.7)	28.4	(28.2)
*118	34.5	(33.3)	31.7	(30.4)

Majority Hispanic Districts

District	% Hispanic Population	% Hispanic VAP
*102	65.6	65.7
*107	65.0	63.9
*110	82.1	83.6
*111	75.7	76.6
*112	67.7	68.7
*113	73.9	75.7
*114	77.5	78.4
*115	65.3	65.3
*117	68.3	69.2

Districts Between 30% and 50% Hispanic Population

District	% Hispanic Population	% Hispanic VAP
58	31.1	31.0
106	32.3	30.1
109	34.5	38.4
116	46.7	46.4

This state house plan would increase the number of districts that elect minorities from 20 to at least 24—and probably 25.

Recompiling election returns:

The first step in the analysis was to recompile past precinct election returns in the proposed districts and to recalculate the candidate totals to determine if the minority-preferred candidates would have won in the proposed districts. The following recent statewide contests were recompiled to determine if a district was an effecive black district: the 1990 general election vote for the retention of Justice Shaw on the state supreme court, the 1990 Democratic primary and runoff for secretary of state which included Alcee Hastings, a black candidate; and the 1988 Democratic presidential preference contest in which Jessee Jackson competed. The statewide election contests examined to determine if a district was an effective Hispanic district were the 1990 and 1986 general election contests for governor, both of which included Robert Martinez, a Hispanic Republican.

The database used for this analysis contained all precincts, even those precincts split between two new districts. Election returns were allocated to the split segments of a precinct in two ways: 1) a disaggregation of the election returns on the basis of the percentage voting age population in each of the split segments; and 2) a disaggregation of the returns that took into account the

racial composition of the split segments of the precinct and the differential voting patterns of the racial groups.

If the recompiled election returns indicated that the minority state house district was clearly a safe minority district, then no further analysis was conducted. In the case of black state house districts, a district was deemed to be a safe black district if it was at least 57% black in total population and the black candidate won with at least 60 percent of the vote in all of the elections examined. A Hispanic house district was considered a safe Hispanic district if it was at least 67% Hispanic in total population and the Hispanic candidate won both of the elections examined. All congressional districts over 30% black or Hispanic, whether they met the above criteria or not, were examined in more detail.

Participation rates and voting patterns by race/ethnicity:

In the second stage of the analysis the voting patterns and participation rates of whites and minorities in Florida were examined using two standard techniques, bivariate ecological regression analysis and homogeneous precinct analysis. Both of these procedures are commonly used in voting rights litigation and were accepted by the Supreme Court in *Thornburg v. Gingles* (1986).

Both of these techniques were used to analyze statewide elections, state legislative elections that occurred within the current districts, and election returns recompiled to the proposed districts in CB/HB 1-E and SJR 2-G. In performing an analysis of voting patterns and participation by race/ethnicity in the proposed districts, only whole precincts were used in the regression analysis unless the plan split more than 30% of the precincts in the districts with significant minority population (districts with 30% or greater black or Hispanic populations). If more than 30% of the precincts were split, then the split parts of the precincts were included in the analysis (with the

corresponding election returns disaggregated to the split segments on the basis of voting age population percentages).

This analysis indicates that blacks in Florida vote cohesively for black candidates. Over 79% of the black voters voted to retain Judge Shaw in the 1990 general election, and over 83% of the black voters voted for Alcee Hastings in the 1990 primary and general elections. This was true statewide as well as within each of the proposed black congressional districts. The degree of white crossover voting for black candidates varied across the state, but was high only in the Shaw retention race (in which a majority of whites voted "yes" to retain Shaw). In the two proposed black districts Judge Shaw also received a majority of the white votes (in congressional district 20 Shaw received approximately 58% of the white vote and in congressional district 15 Shaw received over 60% of the white vote).

Turnout rates for blacks tended to be lower than turnout rates for whites in general elections (and higher than whites in Democratic primaries), but this also varied across the state. For example, in the 1990 general election, approximately 38% of the white voting age population turned out and approximately 20% of the black voting age population turned out. However, in some districts blacks turned out to vote at a higher rate than whites in general elections—for instance, in proposed congressional district 20 only 30% of the whites of voting age turned out, while approximately 35% of the black voting age population turned out to vote.

Hispanic voters also voted cohesively, although not to the same degree as black voters. For example, in the 1990 general election, about 59% of the Hispanics voting in the gubernatorial contest voted for Martinez. This percentage appears to be somewhat higher in the two majority Hispanic congressional districts: in congressional district 17 Martinez garnered about 64% of the Hispanic vote and

in congressional district 18 Martinez received over 70% of the vote. On the other hand, white crossover voting for Hispanic candidates tended to be higher than white crossover voting for black candidates. In the 1990 general election, for example, Martinez received over 45% of the Anglo vote statewide, and a majority of the white vote in proposed congressional district 17. In proposed congressional district 18, however, only about 30% of the Anglos voted for Martinez. Hispanic turnout was lower than either black or white turnout. For example, in the 1990 general election less than 16% of the Hispanic voting age population turned out to vote.

Equalizing percentages:

Because minority communities tend to have fewer members of voting age and tend to participate in elections at a lower rate than whites, courts have recognized the need to create "supermajority" minority districts. However, the courts and the Justice Department have accepted that there is no fixed number—65 percent or otherwise—at which a district becomes an effective minority district.[2] A jurisdiction-specific analysis must be conducted to determine the minority population necessary to give minorities an equal opportunity to elect candidates of choice. Using estimates of black, Hispanic and white participation rates, "equalizing percentages" were calculated. An equalizing percentage is the percentage black or Hispanic voting age population needed to equalize white and minority turnout in the district on election day.

The equalization percentages for blacks and whites varied depending on the district, but fell in the range of 50% to 60% black voting age population. For proposed

[2] See Kimball Brace, Bernard Grofman, Lisa Handley and Richard Niemi, "Minority Voting Equality: The 65 Percent Rule in Theory and Practice" in *Law and Policy*, Volume 10 (1), January 1988.

congressional district 20, because blacks turnout at a higher rate than whites, the equalization percentage is less than 50%. In congressional district 15, the equalization percentage ranges from 55% (1990 general) to slightly over 58% (1988 general election). The equalization percentages for Hispanics are considerably higher, ranging from about 60% to 90% Hispanic voting age population. For example, in congressional district 17 the equalizing percentage ranges from 58% in the 1986 general to 70% in the 1990 general. In congressional district 18, because Hispanic turnout is even lower, the percentage Hispanic voting age population necessary to equalize Hispanic and Anglo turnout ranges from 73% to 75%, depending on the election.

Conclusion:

The state house plan, SJR 2-G, creates 15 effective black districts and 9 effective Hispanic districts, as well as another majority Hispanic district that will probably elect a Hispanic-preferred candidate. The congressional plan, CS/HB 1-E, creates two effective black congressional districts and one effective Hispanic congressional district—as well as another Hispanic congressional district that will probably elect a Hispanic to office. In comparison to the existing state house and congressional districts, both of these plans represent an enhancement with respect to the ability of minority voters to participate in the political process and elect candidates of their choice in Florida.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 92-40015-WS

MIGUEL DE GRANDY, *et al.*,
Plaintiffs,
and

GWEN HUMPHREY, *et al.*,
Plaintiffs-Intervenors,

-vs-

T.K. WETHERELL, in his official capacity, *et al.*,
Defendants.

T.K. WETHERELL, in his official capacity, *et al.*,
Third-Party Plaintiffs,

-vs

WILLIAM P. BARR, as Attorney General
of the United States of America,
Third-Party Defendant.

Case No. 92-40131-WS

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al.*,
Plaintiffs,

-vs-

LAWTON CHILES, in his official capacity, *et al.*,
Defendants.

REPORT AND RECOMMENDATION OF SPECIAL MASTER ON CONGRESSIONAL REDISTRICTING PLANS

May 18, 1992

Pursuant to the Three-Judge Court's April 6, 1992 Order Appointing Special Master, I respectfully submit a recommended congressional redistricting plan for Florida. *See* Appendix A (Report to the Special Master by the Independent Expert Witness) at Attachment A (Maps of the Independent Expert's Proposed Plan) and Attachment G (Statistics for Independent Expert Plan) [collectively "Independent Expert Plan"]. I recommend the Independent Expert Plan (Plan 308) because it comports with the United States Constitution and the Voting Rights Act, 42 U.S.C. § 1973. In particular, the Independent Expert Plan best serves the purposes underlying Section 2 of the Voting Rights Act by providing racial and language minorities a full and effective opportunity to elect candidates of their choice.

I stress that my endorsement of the plan, drawn by Independent Expert Professor M. David Gelfand, is based upon my own independent and careful consideration of the relevant law and the entire record, including the following: the maps, statistics, and other data describing the numerous plans; supporting expert reports and legal memoranda; six full days of hearings over which I presided; and voluminous exhibits. In recommending the Independent Expert Plan, by refereince I adopt as my own the factual findings and legal conclusions set forth in his Independent Expert Report. *See* Appendix A. Where necessary, I have provided additional findings of fact and conclusions of law below in support of the recommendation.[1]

Before proceeding, I pause to recognize the historic importance of the present occasion. For more than one

[1] The scores of exhibits and transcripts (11 volumes) are in the possession of the Clerk of Court, United States District Court, Northern District of Florida, Tallahassee.

hundred years, discriminatory practices such as poll taxes, secret ballot boxes, segregated schools and at-large election schemes have precluded or limited the ability of minorities in Florida to participate in the political system. Yet, during the past two weeks I had the honor of presiding over six days of congressional redistricting hearings in which the principal focus of virtually every party and amicus curiae was the enhancement of opportunities for racial and language minorities for full and effective political representation. How far we've come!

I also note that in my twenty-six years on the United States District Court bench, I have, by random assignment, handled a number of cases involving the protection of minority rights. My first such assignment involved the desegregation of the Dade County School System, the fourth largest in the nation. The most recent concerned the United States' policy of interdicting and repatriating Haitians fleeing from political persecution in their homeland. Such cases are particularly difficult because of their legal and social complexity and the compressed time frame in which they often are presented. As in the past, I am guided by the applicable law and greatly assisted by the numerous able counsel and experts. In this case, both point me toward a result that will increase the fair and effective representation of racial and language minorities in the halls of Congress.

I. PROCEDURAL BACKGROUND

On January 14, 1992, the opening of the 1992 Regular Session of the Florida Legislature, a group of registered voters from around the state, including Miguel De Grandy, a member of the Florida House of Representatives (collectively "De Grandy plaintiffs"), filed the initial underlying action. The complaint against various state House and Senate officials and the Governor, Secretary of State and Attorney General of the State of Florida alleged malapportionment of Florida's United States congressional

and state legislative districts and urged the federal court to assert jurisdiction to redistrict and reapportion the state.[2] On January 20, 1992, Chief United States District Judge William Stafford of the United States District Court for the Northern District of Florida empaneled a Three-Judge Court ("Court") in this district to hear the action. On January 23, 1992, plaintiffs filed their first amended complaint. After briefing and oral argument, on February 19, 1992 the Court granted defendants' motions to dismiss the complaint based on lack of subject matter jurisdiction.

On March 9, 1992, plaintiffs filed their second amended complaint. On March 13, 1992, the Regular Session of the Florida Legislature ended without enactment of either a congresisonal redistricting or legislative reapportionment scheme. On March 27, 1992, the Court denied all motions to dismiss and set an expedited schedule for purposes of adopting congressional and legislative schemes no later than May 29, 1992. On March 31, 1992, the Court made clear that its March 27 Order did not enjoin or preclude the State of Florida, its Legislature, its Supreme Court, or any state officer from timely effecting proper congressional redistricting or legislative apportionment.

On April 2, 1992, pursuant to Article III, Section 16, of the Florida Constitution, Governor Lawton Chiles called a Special Session of the Florida Legislature in order to accomplish legislative reapportionment. On April 10, 1992, the Florida Legislature adopted Senate Joint Resolution 2-G, which reapportioned the Florida's state House and Senate districts. Though the House did pass such a plan, the Legislature as a whole was unable to

[2] "Reapportionment" is the redistribution among political subunits of available legislative and congressional seats. "Redistricting" is the drawing of new constituency boundaries. *See* Bryant, Giddings & Kaplan, *Partisan Gerrymandering: A New Concern for Florida's 1992 Reapportionment*, 19 Fla. St. U.L. Rev. 265, 265 n.3 (1991).

enact a congressional redistricting plan. In the meantime, this case proceeded.

On April 7, 1992, the Florida State Conference of the National Association for the Advancement of Colored People Branches and a number of individual African-American voters (collectively "NAACP") filed a similar suit against the same defendants enamed in the De Grandy complaint, alleging that Florida's malapportioned congressional and legislative districts dilute the voting strength of African-American voters. The Court consolidated the two cases into the present one.

The Court also granted leave to the following parties to participate in this action as intervenors or amici: amicus curiae Simon Ferro, State Chairman of the Florida Democratic Party; plaintiff-intervenor Gwen Humphrey, et al.; plaintiff-intervenor Darryl Reaves, et al.; amicus curiae Common Cause; amicus curiae Florida AFL-CIO; amicus curae Craig James; amici curiae The Cuban American Bar Association and the Coalition of Hispanic Women; defendant-intervenor Alzo Reddick; amicus curiae Daniel Webster; plaintiff-intervenor Jim Bacchus and plaintiff-intervenor Andy Ireland.

On April 17, 1992, the parties, intervenors, and amici curiae filed their proposed redistricting plans with supporting expert reports and legal memoranda. On the same date, the Attorney General of the State of Florida filed a Notice of Submission of Senate Joint Resolution 2-G on legislative redistricting to the United States Department for review under Section 5 of the Voting Rights Act. Also on that day, the Court implemented alternative timetable, bifurcating the proceedings into two sets of hearings, one for congressional redistricting and one for legislative reapportionment. On April 30, 1992, the Court struck down the existing congressional scheme as unconstitutional. On May 13, 1992, the Court stayed the portion of this case dealing with legislative reapportionment in light of validation of Senate Joint Resolution 2-G

by the Florida Supreme Court and pending preclearance review of the reapportionment by the United States Department of Justice.

Turning to the background for this Report, on April 6, 1992, the Court appointed me as Special Master in this case. In the absence of a legislatively enacted congressional redistricting plan, the Court directed me to consider and evaluate congressional redistricting plans for Florida and to recommend to the court a plan "which comports with the United States Constitution and the requirements of the Voting Rights Act, 42 U.S.C. § 1973, *et seq.*" April 6, 1992 Order Appointing Special Master at 3. The Court authorized me either to adopt and recommend one of the numerous plans proposed by parties and other interested persons or to recommend a different plan based upon the evidence and my expertise.

For assistance in this very complex process, on April 24, 1992 I appointed Professor M. David Gelfand as an Independent Expert and directed him to review and evaluate the plans and to recommend either a plan submitted by a party or a plan of his own formulation. No party objected to his appointment or assignment.[3] During the week of May 4, 1992, I conducted hearings and received evidence on the merits of numerous plans. On May 14, 1992, Professor Gelfand submitted an Independent Expert Report, which evaluated the plans and recommended Independent Expert Plan 308, which was drawn from several of the plans submitted. *See* Appendix A at 18-34 (evaluating various plans); *see also* Attachments; Independent Expert Exhibits 1-8. The following day, the parties cross-examined Professor Gelfand regarding the Independent Expert Plan for several hours. After listening

[3] I mention this because one or more parties objected to the more than two dozen persons suggested by me or one of the parties to serve as the Independent Expert to evaluate the state Senate and House reapportionment plans.

closely to the cross-examination and reviewing the transcript, I find nothing that undermines his recommendation.

II. ADDITIONAL LEGAL CONCLUSIONS

When a legislative body fails to enact redistricting legislation, "it becomes the [very] unwelcome obligation of the federal court to devise and impose" a redistricting scheme. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). My review of the relevant caselaw and the record evidence suggests that the approach recommended by the Independent Expert is appropriate. *See* Appendix A at 8-18. Accordingly, the plans are properly evaluated in light of the two mandatory legal criteria: population equality and the racial fairness standard, *see, e.g., Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991); *Major v. Treen*, 574 F. Supp. 325, 342 n.22 (1983) (three-judge court); *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, No. 79,674, slip op. 3, 12-13 (Fla. May 13, 1992) [hereafter "*In re SJR 2G*"]; *In re Reapportionment of the Colorado General Assembly*, 1992 WL 48569 (Colo., Mar. 13, 1992); *Wilson v. Eu*, 823 P.2d 545, 549, 551 (Cal. 1992).[4] The plans also may be evaluated in light of additional permissive criteria such as contiguity, compactness, respect for traditional boundaries, maintaining communities of interest, and encouraging party competitiveness.[5] With respect to these legal criteria, I find it necessary to discuss Setcions 2 and 5 of the Voting Rights Act further,

[4] The demographic composition of the voting age population ("VAP") of a district is appropriately considered in determining whether it is an effective district. A supermajority of the VAP is required for an Hispanic district, due to the large number of noncitizens and generally lower voter registration rates among Hispanics in Florida.

[5] I note that the Independent Expert did not consider the effect of redistricting on incumbents. *Accord Wilson v. Eu*, 823 P.2d 545, 1992 Cal. LEXIS 6, at *8 (Cal. 1992).

as they bear upon the mandatory "racial fairness" requirement.

A. *Section 2 and Racial Fairness*

A court-made plan must not have the intent or effect of diluting the votes of racial or language minorities. That is, the plan must not dilute minority voting strength. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (Senate Report on 1982 Amendments to the Voting Rights Act), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 204 [hereafter "Senate Report"]; *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); April 6, 1992 Order Appointing Special Master at 3.

Congress enacted the Voting Rights Act of 1965 pursuant to authority granted by the Fifteenth Amendment to the United States Constitution. Section 2 of the Act provided that "[n]o voting qualifications or prerequisites to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (Supp. III 1965-1967). The Voting Rights Act was later enlarged to cover language minorities, including Hispanics. 42 U.S.C. § 1973b(f) (1976).

Until 1980, those challenging apportionment plans under the Voting Rights Act were not required to prove deliberate discrimination in order to succeed. However, in *County of Mobile v. Bolden*, 446 U.S. 55 (1980), a plurality of the United States Supreme Court held that under the Voting Rights Act a plaintiff was required to prove discriminatory intent on the part of the legislators in order to establish that an apportionment scheme violated section 2. *Id.* at 60-61. In response to *Bolden*, Congress amended section 2 by including a "results" standard for determining whether an apportionment scheme violates section 2. Pub. L. No. 97-205, 96 Stat. 131, 134 (1982). Under the 1982 amendment, a violation of section 2 exists where the "totality of circumstances" reveals that "the political process leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1982).[6]

In the Senate Report accompanying the bill to amend the Voting Rights Act, the Judiciary Committee delineated the following "typical factors" that might be probative of whether the "totality of the circumstances" supports a finding of a section 2 violation:

> 1. the extent of any history of official discriminiation in the state or political subdivision that touched the right of the members of the minority group to

---

[6] Section 2 provides in full as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) [regarding language minority groups], as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other member of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982); *see Solomon v. Liberty County*, 899 F.2d 1012, 1015-16 (11th Cir. 1990). As a result of Congress's 1982 amendment to section 2, a plaintiff may establish a section 2 violation if a redistricting plan has the discriminatory effect of diluting minority voting strength. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196, 204 (E.D. Ark. 1989); *Jordan v. Winter*, 604 F. Supp. 807, 811-12 (N.D. Miss. 1984).[7]

[7] The 1982 amendment to the Voting Rights Act was first considered by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), a case involving a section 2 challenge to certain multi-member districts for the North Carolina legislature. The Court held that plaintiffs challenging an at large or multi-member system must prove three threshold criteria: (1) that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that the minority group is politically cohesive; and (3) that bloc voting by the white majority usually defeats the minority's preferred candidate. *Id.* at 50-51. Because the present proceeding involves an evaluation of proposed single-member plans, rather than a challenge to an existing at-large plan, *Gingles* is not dispositive. As Professor Theodore Arrington explained, *Gingles* "doesn't quite fit" in the present situation. Tr., vol. III at 42; *see also In re SJR 2G*, No. 79,674 at 29 (Shaw, J., dissenting).

The present situation is unique. Because the legislature failed to enact a redistricting scheme, there has not been an outright challenge to an operative plan. Additionally, time constraints preclude the type of factually intensive adjudication required in a traditional section 2 challenge. *See Gingles*, 478 U.S. at 45-46. Nevertheless, all the parties and amici curiae agree that section 2 must, at a minimum, *be considered* in crafting the redistricting plan. Tr., vol. II at 22. Moreover, the Court has instructed me to "recommend to the court a congressional redistricting . . . plan for Florida which comports with . . . the requirements of the Voting Rights Act, 42 U.S.C. § 1973 (1982) *et seq.*" *See* Order Appointing Special Master at 3. The parties, however, remain divided over the question of the extent to which I should consider section 2 in the present proceedings.

I have reviewed the relevant caselaw for guidance in the little time available. *See, e.g., In re SJR 2G*, No. 79,674 at 12-22, 31-41 (considering section 2 in context of validating legislative reapportionment scheme); *Burton v. Sheheen*, No. 3:91-2983-1, at 44 (D.S.C. May 1, 1992) (considering section 2 in section 5 case to extent possible because it would be "anomalous . . . to adopt plan which immediately lends itself to attack under section 2"); *Wesch v. Hunt*, No. 91-0797, 1992 WL 45533,

at *7-8 (S.D. Ala. March 9, 1992) (concluding that full-scale section 2 analysis unnecessary where the parties agreed that a significant African-American majority district should be created); *Wilson v. Eu*, 823 P.2d 545, 547 (Cal. 1992) (involving congressional and legislative redistricting case where the three special masters "endeavored to draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings"); *Edge v. Sumter County School Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985) (holding that district court in section 5 proceeding could not validly adopt reapportionment plan without determining whether plan complied with section 2); *Connor v. Finch*, 431 U.S. 407, 425 (1977) (finding it imperative for district court to attempt to draw plan that complies with established constitutional standards and which avoids new constitutional challenges); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 646 (N.D. Ill. 1991) (analyzing proposed congressional redistricting plans for discriminatory effects under terms of section 2).

Based on my review of the caselaw, the testimony of experts, the parties' legal memornda, the parties agreement that I should "respect minority concentrations," Tr., vol. II at 23-24, and Florida's history of discrimination and its adverse effect upon minority access to the political system, *see infra*, III.A., I conclude that the law supports the drawing of a minority district where, in light of minority concentrations and community of interests, such a district can reasonably be drawn. Because all of the proposed plans include at least one African-American majority VAP district and two Hispanic supermajority VAP districts in south Florida, *see* Appendix A at Attachment C; Indep. Exp. Ex. 3; Senate Exs. 4-14; Tr., vol. II at 23-24, this conclusion affects only the question of whether to draw additional minority districts elsewhere in Florida. *See Wesch v. Hunt*, 1992 WL 45533, at *7-8. Specifically, in light of the parties' agreement and the Court's

order directing me to recommend a plan that comports with the Voting Rights Act, the present section 2 inquiry should center on the principal issues which divide the parties: whether, in addition to the agreed-upon African-American majority VAP district, the redistricting scheme should include a second African-American majority VAP district; and whether, instead of or in addition to a second African-American majority VAP district, one (or more) African-American "influence districts" [8] should be drawn.

---

[8] In *Thornburg v. Gingles*, the United States Supreme Court stated in a footnote that it had "no occasion to consider whether section 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections." *Gingles*, 478 U.S. at 46-47 n.12.

Recently, however, the United States Supreme Court recognized the possibility of an "influence" vote-dilution claim by a minority voter group too small to constitute a majority. *Chisom v. Roemer* —— U.S. ——, 111 S. Ct. 2354, 2365 n.24 (1991) Justice Scalia commented in his dissent that "minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable bases 'elect representatives of their choice' would be entirely without section 2 protection." *Id.* at 2371 (Scalia, J., dissenting). In response, the majority stated that the dissent erroneously assumed "that a small group of voters can never influence the outcome of an election." *Id.* at 2365 n.24.

Based the footnote in *Chisom v. Roemer*, courts have recognized the viability of section 2 claims made by minority groups who constitute less than a majority. *See, e.g., Wilson v. Eu*, 823 P.2d 545, 1992 Cal. LEXIS 6 (Cal. 1992) (recognizing legal basis of section 2 "influence" claims as "sufficiently strong" to consider in drawing court-ordered redistricting plan); *Armour v. State of Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991) (sustaining section 2 claim regardless of whether minority group large enough to form a majority in either of two districts); *see also West v. Clinton*, No. 91-2237, 1992 U.S.Dist. LEXIS 3058, at *8 (W. D. Ark. March 12, 1992) (assuming legal viability of influence district theory); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), (allowing

The present parties supporting influence districts argue that those districts with less than a majority African-American VAP have the potential to elect candidates of their choice. Those advocating the creation of a second majority district instead contend that creation of influence districts at the expense of a second majority African-American VAP district will result in less minority voter influence. *See, e.g.,* Defendants' Margolis and Gordon Post-Hearing Memoranda at 4-5. For the reasons discussed below, I find that the latter approach more effectively furthers the goals of section 2 under the circumstances of the present case.

Congress clearly intended that section 2 provide a "complete remedy" for dilution of minority voting strength and a "full opportunity" for minorities to participate and elect candiates of their choice. *See* S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982); *see also Kirksey v. Board of Supervisors,* 554 F.2d 139, 148-50 (5th Cir.) *cert. denied,* 434 U.S. 968 (1977).[7] In order to provide a complete "remedy" and a full opportunity to participate, minority representation in a district must be sufficiently high. In testifying about the risks of having a district with a minority voting age population that is too low, Professor Arrington explained that although a "black can win in a district that doesn't have a black majority, . . . the object is to create districts where the black can win without having to go before the white power structure [to] get

---

influence claim), *cert. denied,* 111 S. Ct. 681 (1991). *But see Turner v. Arkansas,* 784 F. Supp. 553, 564 (E.D. Ark. 1991) (finding no actionable section 2 claim for failure to create influence district).

[7] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

their approval, and that's what you want to draw if you can." Tr., vol. III, at 57.[8]

Similarly, as Professor Gelfand notes in his Independent Expert Report, "accepting a plan in which minority groups can only 'influence' elections, merely perpetuates, albeit in a somewhat different manner, the submergence of Florida's African Americans in districts composed of bloc-voting whites," unless the level of African-American influence is sufficiently strong. Appendix A at 13. Thus, creation of minority influence districts can result in an electoral scheme which does not allow minorities a full opportunity to elect the candidate of their choice if the minority VAP is too low.[9]

A number of courts have addressed the issue of whether the size of a particular minority district is sufficient to further the goals of section 2. For example, in *Kirksey,* the court rejected a court-ordered plan which fragmented a concentrated minority voting community so that no district contained an African-American VAP majority. *Kirksey,* 554 F.2d at 149. The court found that the "predictable effect" of the plan was to decrease the participation of African-American voters so that they had no realistic opportunity to elect a candidate of their choice. *Id.* at 150.

The court in *Wilson v. Eu* recognized the propriety of creating minority influence districts to maximize the voting potential of geographically compact minority groups.

---

[8] I should note that it is the race of the voter, not the race of the candidate, that is critical.

[9] At the hearing, Professor Arrington further testified that "it should be obvious to everyone that blacks are going to have a better influence in a district where they constitute 40 percent of the voting age population than they are in a district where they constitute ten or twenty percent. . . . I don't think you are getting any significant influence for the black community until you get well above 30 percent. . . ." Tr., vol. III at 84.

Wilson, 1992 Cal. LEXIS 6, at *11 (citations omitted). Yet *Wilson* is consistent with the *Kirksey* approach. Unlike *Kirksey*, the minority influence districts in *Wilson* were of an "appreciable size" so that the voting potential of minorities would be maximized rather than diluted, even without a majority voting age population. *Id.* Also, the precise question presented here—whether a majority VAP district is more effective than an influence district—was not presented in those cases.

In *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), the Seventh Circuit determined that creation of a super-majority rather than a majority ward was necessary to provide minorities with a reasonable opportunity to elect a representaitve of their choice. The court stated that "[t]here is simply no point in providing minorities with a 'remedy' for the illegal deprivation of their representational rights in a form which will not in fact provide them with a realistic opportunity to elect a representative of their choice." *Id.* at 1413.

In summary, both the expert testimony and the relevant caselaw support the conclusion that, under the circumstances of the present case, the creation of a second African-American VAP majority district is preferable to the creation of additional influence district. However, this does not mean that an influence district should not also be drawn where the minority concentration is sufficiently strong.[10] *See Wilson v. Eu*, 1992 Cal. LEXIS 6, at *8.

B. *Section 5 of the Voting Rights Act*

The other relevant provision of the Voting Rights Act is section 5, 42 U.S.C. § 1973(c), which applies to coun-

[10] Professor Arrington testified that if it is "not possible to draw a black majority district, but it is possible to concentrate the black population in order to draw a district in which blacks would be very influential, then I think you have an obligation to do that." Tr., vol. III at 13.

ties "covered" by section 4. *See* 42 U.S.C. § 1973(b). Florida has five "covered" counties: Collier, Hardee, Hendry, Hillsborough and Monroe.

For legislatively adopted plans, section 5 requires that any change of voting procedures in covered counties be precleared by the United States District Court for the District of Columbia or by the United States Attorney General. A change affecting voting may be rejected under section 5 if it results in a retrogression, that is, if the change makes members of racial or language minority group worse off than they were before the change with respect to their ability to participate effectively in the electoral process. *See Beer v. United States*, 425 U.S. 130 (1976); *see also Lockhart v. United States*, 460 U.S. 125 (1983).

Unlike legislatively adopted plans, preclearance is not required for a court-ordered congressional redistricting plan. *McDaniel v. Sanchez*, 452 U.S., 130, 138 (1981); *see also* 28 C.F.R. § 51.18 (1991) (holding court-ordered changes affecting voting not subject to section 5 preclearance requirements, unless they reflect policy choices of submitting authority.). Nevertheless, courts must be cognizant of the section 5 requirement that voting changes not have the purpose or effect of denying or abridging the right to vote on the basis of race or language. 42 U.S.C. § 1973(c); *McDaniel*, 452 U.S. at 148-49. Therefore, any redistricting plan should avoid retrogression with regard to the voting strength of racial or language minorities.

In evaluating a redistricting plan's retrogressive effects on "covered" counties, it is important that the court consider the overall plan. Recently, the Supreme Court of Florida explained that, "in restructuring all of the district lines, there is bound to be some retrogression in minority voting strength in some districts. It is more appropriate to look at the overall plan to see whether or

not it discriminates against minorities." *In re SJR 2G*, No. 79,674 at 17.

There are at least two reasons why the effect of a redistricting plan on Florida's five covered counties cannot be examined in a vacuum. First, Florida has acquired four additional congressional seats. The redrawing of district lines to include four new districts while adhering to the one-person, one-vote requirement affects many counties throughout the state, including section 5 counties. For example, under the existing districting scheme, Hillsborough County's Hispanic and African-American populations are represented in two districts; by contrast, under almost all of the proposed redistricting plans, Hillsborough's minority populations would be represented in four districts. *See* Appendix B (Hispanic and Black Populations by County, Current & Proposed Districts: Section 5 Counties).

Second, as discussed above and in the Independent Expert Report, all plan proponents have attempted to craft plans that comply with Section 2 of the Voting Rights Act. The configuration and location of each plan's proposed minority districts also affect the minority representation in the covered counties. For example, Hendry County's Hispanics fare better in Margolis' District 21 than in the existing District 12, with an increase in representation from 7.54% to 65.03%. On the other hand. African-American representation in District 21 decreases slightly in Margolis' plan. By contrast, the Independent Expert Plan provides for a substantial increase in African-American representation in Hendry County (from 15.54% in the current district to 51.65% in District 23 and 4.02% in District 16) and a slight increase in Hispanic representation (from 7.54% in the existing district to 9.37% in District 23 and 6.31% in District 16). In all but one of the proposed plans (NAACP), there is a decline in representation of Hispanics in Monroe County. In addition, all of the proposed plans provide for only marginal changes, both positive and negative, in representation for Hispanics and African-Americans in Hardee County. In sum, no single proposed plan satisfies the requirements of section 5 better than any other plan.

As with the other proposed plans, the Independent Expert Plan results in a decrease in representation for some minorities in covered counties and in increase in other such counties. More importantly, however, the overall plan substantially strengthens minority representation in Florida. As discussed above, the Independent Expert Plan effectively furthers the goals of the Voting Rights Act. Viewing the effect of the Independent Expert Plan as a whole, I find that it is not retrogressive for purposes of section 5. *See In re SJR 2G*, No. 79,674 at 17. It creates the first two African-American majority VAP districts in the history of Florida, plus two Hispanic VAP supermajority districts and an African-American influence district.

III. ADDITIONAL FINDINGS OF FACT

As noted earlier, based on an independent review of the record, the undersigned adopts by reference the factual findings of the Independent Expert. *See* Appendix A. Nevertheless, the undersigned deems it necessary to make additional findings of fact.[11]

A. *Senate Factors*

As noted above, *Gingles* is not directly on point in this case because we are considering numerous proposed plans rather than a challenge to an existing plan. Nevertheless, a short discussion of the Senate Factors is appropriate because it underscores the importance of not adopting a

[11] Any finding of fact which may be conclusion of law shall be considered a conclusion of law. Conversely, any conclusion of law which may be a finding of fact shall be so considered. The same shall apply for the Independent Expert Report.

plan which "immediately lends itself to attack under section 2." *Burton v. Sheheen*, No. 3:91-2983-1, at 44 (D.S.C. May 1, 1992); *see In re SJR 2G*, No. 79,674 at 32-34 (Shaw, J. dissenting).

1. *History of Official Discrimination*

Florida has a long and unfortunate history of official discrimination against minorities that has influenced their ability to participate in the political process. *Accord id.* at 32-34 (Shaw, J. dissenting) (discussing historical material of which, Court in present case has taken judicial notice). Our state constitution of 1885 authorized the imposition of poll taxes, required segregated schools and prohibited interracial marriages. *See* Fla. Const. art. VI, § 8 (1885); *id.* art. XII, § 12; *id.* art. XVI, § 24. As recently as 1967, section 350.20, Florida Statutes, provided in part:

> The Florida public service commissioners may prescribe reasonable rules and regulations relating to the separation of white and colored passengers in passenger cars being operated in this state by any railroad company or other common carrier.

Section 1.01(6), Florida Statutes (1967), further stated in part:

> The words "negro," "colored," "colored persons," "mulatto" or "persons of color," when applied to persons, include every person having one-eighth or more of African or negro blood.

In addition, this Court has taken judicial notice of recent cases from around the state striking down such discriminatory election practices as at-large election schemes, white primaries, majority-vote requirements, and candidate filing fees. As explained by Dr. Darryl Paulson, expert witness for the NAACP, such official state discrimination has adversely affected the ability of minorities to participate in the political process. Tr., vol. I at 70.

2. *Racially Polarized Voting*

Racially polarized voting exists throughout Florida to varying degrees. Agreement among the parties, statistical analyses and expert testimony support this conclusion. Dr. Mark Stern, expert witness for the NAACP, stated this fact simply:

> Black voters in Florida generally vote as a cohesive racial bloc for the black candidate when there is a black versus white choice on the ballot for a given office. White voters generally vote against the black candidate and vote as a racial bloc for the white candidate when there is a black versus white choice of candidates on the ballot for a given office.

Florida Supreme Court Justice Leander Shaw recently reached the same conclusion. *See In re SJR 2G*, No. 79,674 at 34-37 (Shaw, J., dissenting).

3. *Other Areas of Discrimination*

Minorities also have borne the effects of discrimination in areas such as education, employment and health care. The Florida Constitution of 1885 demanded the separate schooling of "[w]hite and colored children." Fla. Const. art. XIV, § 24 (1885). The 1990 census figures demonstrate that among persons sixteen years or older, African-Americans are more than twice as likely to be unemployed as whites. As Dr. Paulson explains, "the poverty rate for black Floridians is more than three times that experienced by whites." He also states that "[v]oting studies have consistently indicated the strong relationship between socio-economic status and political participation. So, in addition to the legal barriers that have prevented blacks from fully participating in the political system, the legacy of racism has created economic barriers that impede black political success."

4. *Election of Minority Officials*

Minorities have had very little success in being elected to either the United States Congress or the Florida Legislature. No African-American has represented Florida in the United States Congress in over a century. Only one Hispanic congressperson serves from Florida. African Americans were unable to elect a single representative to the state House from 1889 until 1968. No African-American representative to the state Senate was elected from the time of Florida's inception until ten years ago. No Hispanic state senator was elected until four years ago. *See In re SJR 2G*, No. 79,674 at 34-37 (Shaw, J., dissenting).

B. Relative Merits of Plan Characteristics

As noted, the undersigned adopts the factual findings of the Independent Expert regarding the relative merits of the various plans. *See* Appendix A at 18-39.

1. *Influence versus Majority District*

The De Grandy, Humphrey and Reaves plaintiffs have each proposed an African-American influence district in Central Florida and in the Panhandle. The proposed Central Florida influence district would likely draw African-American voters from up to seven other congressional districts, which would diminish minority voting strength in the other districts. Tr., vol. I, at 113. Moreover, the Central Florida influence district links Tampa and Orlando communities, which are likely to have competing economic interest. *Id.*, vol. VIII at 27.

The same plaintiffs also proposed an influence district in North Florida. Unless the Panhandle district proposed by De Grandy and Reaves is stretched across an area of largely white populated counties, it does not appear to have enough African-American voters to provide a reasonable opportunity of electing candidates of their choice.

Id. Furthermore, because the white populations in Panhandle areas are subject to growth in the coming years, the African-American influence in a district spanning those counties may decrease accordingly. *Id.* at 203; *see also*, Tr., vol. III at 73-74 (discussing dilution problems caused by white in-migration).

In addition to having districts that are less susceptible to vote dilution caused by white in-migration, other reasons support choosing African-American majority districts over influence districts. For example, as Professor Moreno testified, the relative difficulty that African-Americans may have raising money makes it important to place African-Americans in a district in which they can elect a candidate of their choice. Tr., vol. IV at 309-11. Majority districts are likely to be more effective than influence districts in this regard.

In short, the creation of two African-American majority VAP districts would provide a better opportunity for African-American voters to elect an African-American candidate, Tr., vol. III at 13, 74-75, as would the creation of another influence district with a sufficiently large African-American population, *id.* at 13. Therefore, I find that an approach which creates two African-American VAP majority districts plus one African-American influence district is the most desirable approach, particularly since, in light of minority concentrations and communities of interest, the districts can reasonably be drawn.

2. *South Florida Supermajority Hispanic District*

Florida's Hispanic population is internally divided in a way that its African-American population is not because it is diverse in terms of race and nationality. Tr., vol. III at 10. However, there is a cohesion among its subdivisions; for example, Dade County's Cuban-American population constitutes a solid community of interest. Tr., vol. IV at 286-87. Therefore, the Margolis plan's proposed

Hispanic districts—both of which join Dade County's Cuban-American population other Hispanics and with non-Hispanics and one of which extends over five counties —unnecessarily splinter a solid community of interest. I do note that the Margolis plan's African-American district in South Florida (District 23) has a higher African-American VAP majority than the Dade County district in the Independent Expert Plan. However, the Margolis plan offers this higher African-American percentage by fracturing the Dade Hispanic community. Moreover, the Margolis plan does not include the third African-American district which is created by the Independent Expert Plan; that third district (District 23) is an influence district which has a substantial African-American majority population of 51.6% and an African-American VAP of 45.6%.

3. *Northeast Florida African-American Majority District*

Several parties proposed districts in Northeast Florida which contained African American majority VAP populations. The evidence showed that due to the cohesiveness of the African-American population, African Americans may constitute a community of interest even if they live in different municipalities. Tr., vol. III at 35, 75-76. Therefore, an African-American majority district, such as the Independent Expert Plan's District 3, may spread over a number of counties without damaging a community of interest. Of course, there are a number of non-racial factors considered in the makeup of a community of interest, e.g., similar economic status, background and aspirations. Tr., vol. I at 112.

4. *Effectiveness of Independent Expert's Districts 3, 17 & 23*

Based upon my review of the evidence in this case, I conclude that Districts 3 and 17 of the Independent Expert's Plan would provide African-American voters with

the opportunity to participate in the political process and to elect congressional candidates of their choice.[12] In addition, I find that the evidence supports the creation of District 23, the "influence" district proposed by the Independent Expert.[13]

In order to obtain independent verification of the effectiveness of these three African-American districts, I asked the House computer staff to run the District Summary for Selected Statewide Races with Black Candidates. *See* Appendix C. This summary reflects the outcomes for each proposed plan for selected statewide races that were identified at the hearings as being racially polarized. *See* Tr., vol. I at 43.

A review of the summary for the Independent Expert Plan indicates that the African-American candidate does well in all of the elections in Districts 3, 17 and 23. The very lowest figure is 55 percent, while the highest is 74 percent. Indeed, all of the figures for the total votes for the African-American candidate in these districts are much better than the candidate's statewide total. In sum, the figures demonstrate that all three reasonably drawn African-American districts proposed by the Independent Expert can be effective. Thus, the Plan should increase the fair and effective representation of racial and language minorities in the halls of Congress.

---

[12] The evidence presented in support of the NAACP and Margolis plans, both of which propose a district very much like District 3, demonstrates the effectiveness of District 3. Similarly, the evidence presented in support of the Lawyers' Committee and De Grandy plans supports the effectiveness of District 17, which is identical to their proposed districts.

[13] District 23 is similar to influence districts proposed by NAACP and De Grandy. In fact, District 23 has a higher African-American VAP percentage than NAACP's proposed district. Consequently, evidence supporting the NAACP and De Grandy districts also supports District 23.

IV. CONCLUSION

Based upon the foregoing legal conclusions and factual findings, as well as those made by the Independent Expert and adopted herein, I respectfully recommend that the Court adopt the Independent Expert Plan (Plan 308)[14] for Florida's new congressional redistricting scheme.[15]

DONE AND ORDERED at Tallahassee, Florida this 18th day of May, 1992.

/s/ [Illegible]
Senior United States District Judge
Acting as Special Master

cc: Counsel of record
Three-Judge Court

---

[14] This plan is described in pages 34-39 of Appendix A to this Report. Maps of the districts, for the state as a whole, and for selected areas, appear in Appendix A at Attachment A; key statistics appear in Appendix A at Attachment G. Additional maps and further statistics are contained in Independent Expert Exhibit 1, with large maps presented as Independent Expert Exhibits 4-6. Finally, technical descriptions of tract and block assignments are contained in Independent Expert Exhibits 2A and 2B and are computed on the electronic tapes distributed to the parties on May 14, 1992.

[15] Implicit in my recommendation is that the Court include in its congressional redistricting order the curative rules found at Attachment D of the Independent Expert Report.

EXCERPTS FROM PLAINTIFFS' THIRD AND FOURTH AMENDED COMPLAINTS

COUNT VIII
JOINT RESOLUTION OF APPORTIONMENT— VIOLATION OF SECTION 2, VOTING RIGHTS ACT

132. Plaintiffs reallege Paragraphs 1 thorugh 131 of this complaint and incorporate those paragraphs herein by reference.

133. The joint resolution of legislative reapportionment, SJR 2-G, purports to create eleven districts in the Florida House of Representatives which contain a majority or African-American voting age population. The joint resolution also purports to create nine districts in the House and which contain a majority voting age population of Hispanics. The racial and ethnic population concentrations of the State of Florida are such that, if the state is divided into equally populated districts which respect communities of interest and follow other non-discriminatory plan drawing criteria, there exists, as a minimum, thirteen districts in the Florida House in which African-Americans constitute a voting age majority in politically cohesive, reasonably compact districts. Similarly, at a minimum, there exists eleven districts which would contain a majority of Hispanic voting age population. These are also politically cohesive and reasonably compact districts.

134. Elections within Florida are characterized by patterns of racial and ethnic block voting. African-American candidates for public office receive substantial support from voters in areas where African-American predominate, but such candidates generally are not successful in obtaining election because of a lack of support from other voters. Similarly, Hispanic candidates for public office receive substantial support from voters in the geo-

graphic areas were Hispanics predominate, but such candidates generally are not successful in obtaining an election because of a lack of support from other voters.

135. African-Americans and Hispanics, have historically been the victims of official discrimination perpetrated by state and local government throughout Florida. Such discrimination has included discrimination touching on the right to register, vote and participate in the political process.

136. Socio-economic statistics demonstrate that African-Americans and Hispanics continue to bear the effects of discrimination in Florida in such areas as education, employment, income and housing.

137. The joint resolution of apportionment, SJR 2-G, unlawfully fragments cohesive minority communities and otherwise impermissibly submerges their right to vote and to participate in the electoral process.

138. For these and other reasons, the political processes leading to nomination and election in the proposed legislative districts in SJR 2-G are not equally open to participation by African-American and Hispanic citizens, and African-Americans and Hispanics have less opportunity than others of the electorate to participate in the process and to elect represntatives of their choice.

139. Defendants and their predecessors were aware of past racially motivated vote dilution and had an opportunity to correct that dilution by creating a redistricting plan in conformity with the Voting Rights Act. Proposals were made which would have appropriately recognized minority voting strength, but were ignored or rejected in order to protect white incumbents. Instead, the Defendants intentionally designed the plan which will have the effect of protecting white anglo incumbent members of the Florida Legislature.

140. Unless the Court orders creation of a lawful and constitutional redistricting plan, African-American and

Hispanic citizens of Florida will suffer the deprivation of important rights and privileges by reason of their race and country of origin.

141. Specifically, SJR 2-G discriminates against African-Americans citizens in the following ways:

a. The African-American population in Escambia County was split into two districts, one of 30% black population and one of 14% black population. SJR 2-G deliberately fractures Escambia County's African-American population in order to protect white, incumbent representative, Speaker-designate Bo Johnson. Alternative plans encapsulate the black population in a relatively compact, cohesive, 40% black community of interest. This Section 2 violation has been mentioned in the Department of Justice preclearance letter of June 16, 1992;

b. In the Florida Panhandle area, the African-American population is split among seven districts with African-American populations ranging from 13% to 39%. This population has historically been fractured and submerged, and easily could be combined to exercise their influence to elect candidates of choice;

c. In the Jacksonville/Duval County area, proposed Districts 14 and 15 in SJR 2-G actually are retrogressive compared to District 16 and 17 created in 1982. In addition, adjacent minority population was not included, specifically to protect a white freshman incumbent. This minority population was fully encapsulated by the Special Master for the North Florida Congressional Minority seat, clearly signifying its cohesiveness and community of interest;

d. In the Alachua County-Putnam County area, SJR 2-G fractures the African-American population in three districts, 27, 29, and 33. This is a blatant attempt to submerge minority population to benefit white incumbents. This minority population was fully encapsulated by the Special Master for the North Florida Congressional

Minority seat, clearly signifying its cohesiveness and community of interest;

e. In the Hillsborough/Pinellas County area, SJR 2-G does not expand African-American influence in any way. In fact, the plan is slightly retrogressive. Given the fact that the United States Department of Justice and the United States District Court for the Northern District of Florida have found that the Downtown Tampa and Downtown St. Petersburg African-American populations are politically cohesive and share a community of interest, there is no reason that these interest groups should be split. Any effort to split these groups results in a dilution of African-American voting strength in the Tampa Bay area. The Pinellas-Hillsborough-Manatee district in SJR 2-G has a black population less than its black population in 1980. Adjacent black population could be added to cure this dilution. Similarly, an additional effective minority seat could be created in Polk County;

f. In the Orange County area, the African-American community has been fractured with approximately a 22% black population submerged into District 38 which benefis a white incumbent. Population is directly adjacent to proposed District 39 and could have been included in District 39 to enhance African-American's voting rights. In Volusia, Seminole, Brevard Counties an alternative proposal was rejected which would have created an effective minority district. Instead, SJR 2-G fragments the minority community in order to protect white incumbent districts, including Speaker T.K. Wetherell and recent party switcher, Frank Stone. The proposed district Plan 292 could be coupled with the submerged population in District 38 to create an additional majority-minority seat. This community of interest was encapsulated in the Special Master plan for Congress. The Congressional Redistricting Plan adopted by the United States District Court recognizes the large community of interest shared by African-American citizens

in the Orange-Seminole-Volusia County areas. Populations could have been combined to create an additional effective African-American seat;

g. SJR 2-G Districts 77, 78, 86, and 73 split significant black populations which could have been combined to create an additional effective African-American seat in these areas;

h. In the Broward-Dade County area, SJR 2-G spilts the black population into several districts. Districts neighboring Districts 93 and 94 in SJR 2-G contain substantial minority populations which were intentionally fragmented to weaken the ability of these African-Americans to elect candidates of choice. In fact, District 94 would not have been carried by Jesse Jackson in the Presidential preference primary. Adjacent black population was intentionally submerged to protect white incumbents, which could be added to make both of these districts effective; This minority population was fully encapsulated by the Special Master for the North Florida Congressional Minority seat, clearly signifying its cohesiveness and community of interest

i. In Dade County, black citizens were fragmented in District 118 and District 119. Many African-American seats were also packed with many Hispanic citizens which dilutes the ability of African-Americans to elect candidates of choice.

The aforementioned examples do not include all instances of Section 2 violations throughout the State of Florida, but are meant to give representative examples of obvious Section 2 violations.

142. SJR 2-G discriminates against Hispanic-American citizens in several ways, including, but not limited to:

a. Hispanic voters are packed in Districts 110 (82.1%), 111 (75.7%), and 114 (77.5%) and further submerges Hispanic voters in black minority districts, specifically, District 103 (62% black, 27.8% Hispanic), Dis-

trict 109 (63.0% black, 34.5% Hispanic), and District 118 (34.5% black, 27.1% Hispanic). Less egregious examples of packing, but still having the same dilutionary effect, are District 104 (58.7% black, 16.1% Hispanic), Anglo District 105 (19.2% Hispanic), Anglo District 106 (32.3% Hispanic), District 108 (66.2% black, 16.0% Hispanic). SJR 2-G appears to purposefully pack, fracture and submerge Hispanic population deliberately to dilute Hispanic voting strength;

b. Nine Hispanic-American majority districts were created in SJR 2-G; however, other plans submitted to the Legislature show that eleven majority-Hispanic-American seats can be created in the Dade County area. This dilution of Hispanic voting strength is accomplished by the aforementioned packing, fracturing and submergence with the intent and purpose of protecting white incumbents;

c. The Hispanic population was also split into districts which encompass areas outside of Dade County and waste Hispanic votes.

143. The legislative redistricting plan in SJR 2-G violates Section 2 of the Voting Rights Act, Title 42, U.S.C. § 1973, *et seq.*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

C. A. No. ———

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF FLORIDA, a State of the United States; T.K. WETHERELL, Speaker of the Florida House of Representatives; GWEN MARGOLIS, President of the Florida Senate; LAWTON CHILES, Governor of the State of Florida; ROBERT BUTTERWORTH, Attorney General for the State of Florida; PETER R. WALLACE, Chairman of the House Reapportionment Committee; JACK GORDON, Chairman of the Senate Reapportionment Committee; JIM SMITH, Secretary of State for the State of Florida,
Defendants.

COMPLAINT

June 23, 1992

The United States of America alleges that:

1. This is a complaint brought on behalf of the United States of America pursuant to 42 U.S.C. 1973, 42 U.S.C. 1973c, 42 U.S.C. 1973j(d), and 28 U.S.C. 2201, to enforce rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and 42 U.S.C. 1973j(f).

3. Defendants are the State of Florida and officials thereof who have duties and responsibilities under the

laws of that state to reapportion the Florida Legislature. Defendant T.K. Wetherell is Speaker of the Florida House of Representatives. Defendant Gwen Margolis is President of the Florida Senate. Defendant Lawton Chiles is Governor of the State of Florida. Defendant Robert Butterworth is the Attorney General for the State of Florida. Defendant Peter R. Wallace is Chairman of the House Reapportionment Committee. Defendant Jack Gordon is Chairman of the Senate Reapportionment Committee. Defendant Jim Smith is Secretary of State for the State of Florida and is responsible under the laws of that state to oversee the conduct of elections. All defendants are sued in their official capacities.

4. The Florida Legislature is comprised of a 120-member House of Representatives and a 40-member State Senate. Members of the House are elected concurrently to two-year terms. Members of the Senate are elected to four-year terms. However, terms of office for members of the Florida Senate are staggered such that half of the Senate runs for a two-year term and half of the Senate runs for a four-year term at the next election following a reapportionment, such as 1992. Members of the Florida House and Florida Senate are elected from single-member districts.

5. The State of Florida has experienced a significant increase in the number and percentage of Hispanic residents during the period from 1980 to 1990. According to the 1980 Census, the population of the State was 9,746,324, of whom 858,158 (8.80%) were Hispanic. According to the 1990 Census, the State's population has grown to 12,973,926, of whom 1,574,143 (12.17%) are Hispanics. In Dade County, the Hispanic population has grown from 580,994 in 1980 to 953,407 in 1990—an increase from 1980 of 64.1 percent. More than 60 percent of the State's Hispanic population resides in Dade County.

6. At the time of the planning for the redistricting on the basis of the 1990 Census, the defendants and members of the Florida Legislature were aware of the significant increase in Hispanic population that had occurred during the period from 1980 to 1990.

7. The Florida State Legislature passed a reapportionment plan ("SJR 2-G") to elect the members of the State Legislature on April 10, 1992. On May 13, 1992, the Florida Supreme Court issued a declaratory judgment determining the validity of SJR 2-G reapportioning the legislature of the State of Florida.

COUNT I

8. The redistricting plans for the members of the Florida Legislature dilute the voting strength of black citizens and Hispanic citizens in several areas of the State, including the following areas:

Dade County

a. In Dade County, Hispanic persons comprise a slight majority (50.5%) of the voting age population. The redistricting plan enacted by the State of Florida for the *House of Representatives* creates 20 districts in the Dade County area. The State's House plan fragments the Hispanic population concentrations such that Hispanics constitute a majority of the voting age population in only nine (9) districts;

b. With respect to the State *Senate* plan, the redistricting plan enacted by the State of Florida creates seven (7) districts in the Dade County area. The State's proposed Senate plan fragments the Hispanic population concentrations such that Hispanics comprise a majority of the voting age population only in three (3) districts;

c. The racial and ethnic population concentrations existing in the Dade County area are such that, if the Dade County area of the State is divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts in the House of Representatives, and one additional district.

d. In the Pensacola-Escambia County area of the State, the redistricting plan enacted by the State of Florida for its House of Representatives divides Escambia County into four (4) House districts. The State's House plan fragments the black population in this area among several districts such that blacks comprise less than 26 percent of the voting age population in each of these four districts. Alternative plans have been developed which unite the black population concentrations in Pensacola-Escambia County into one district in which black citizens would have a meaningful opportunity to effect elections for the House of Representatives.

9. Elections in the State of Florida, including elections for positions in the State Legislature, are characterized by patterns of racial and ethnic bloc voting.

a. Hispanics are politically cohesive. Hispanic candidates for public office generally receive substantial support from Hispanic voters, but such candidates often are not successful in obtaining election because of a lack of support from other voters.

b. Blacks are politically cohesive. Black candidates for public office generally receive substantial support from black voters, but such candidates often

are not successful in obtaining elections because of a lack of support from other voters.

10. Blacks and Hispanics in Florida have, historically, been the victims of official discrimination perpetrated by the State of Florida and local governments therein. Such discrimination has included discrimination touching on the right of black citizens and the Spanish-speaking and other language minorities to register, vote and participate in the political process.

11. Socioeconomic statistics demonstrate that blacks and Hispanics in Florida continue to bear the effects of discrimination in such areas as education, employment, income, health and housing. The depressed socioeconomic status of blacks and Hispanics in the State of Florida has a disparate and injurious effect on the ability of black and Hispanic citizens to participate equally in the political process and to have an equal opportunity to elect a candidate of their choice to the State Legislature.

12. Under the totality of circumstances, and in the context of the factual circumstances described in paragraphs 4 to 14, *supra,* the redistricting plans for the Florida House of Representatives and the Florida State Senate deprive Hispanic citizens and black citizens in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature.

COUNT II

13. The United States realleges the facts set out in paragraphs 4 through 12, above.

14. The State's proposed Senate plan in the Hillsborough County area divided the politically cohesive minority populations in the Tampa and St. Petersburg areas such that there were no senatorial districts in which minority persons constituted a majority of the voting age population. On June 16, 1992, the Attorney General

interposed a timely objection to the Senate plan pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The Senate plan is legally unenforceable. Alternative plans for the State Senate are available which remedy the Section 5 objection interposed by the Attorney General. These alternative plans unite the minority populations in Tampa and St. Petersburg to provide minority voters an effective opportunity to elect their preferred candidate to the State Senate.

15. With regard to both Counts I & II, unless enjoined by this Court, the defendants will fail to devise, and implement in 1992, plans for their State House and Senate plan which meet the requirements of federal law.

WHEREFORE, the United States prays that a three-judge Court be convened pursuant to 28 U.S.C. 2284 and 42 U.S.C. 1973c, and thereafter enter a judgment:

(a) Declaring that the redistricting plans for the Florida House of Representatives and the Florida Senate constitute voting standards, practices, or procedures within the meaning of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and that those redistricting plans violate Section 2;

(b) Declaring that the redistricting plan for the Florida State Senate is a standard, practice, or procedure with respect to voting within the meaning of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and that the plan has failed to satisfy the preclearance requirements of Section 5;

(c) Enjoining defendants, their agents and successors in office, and all persons acting in concert with them from administering, implementing or conducting any election for members of the Florida House of Representatives and the Florida State Senate pursuant to the statutorily invalid plans; and

(d) Ordering defendants to devise new plans for the election of the Florida House and Florida Senate that meet the requirements of federal law. If the defendants fail to devise such plans, the Court should order plans into effect.

Plaintiff further prays that the Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

WILLIAM P. BARR
Attorney General

By: /s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

/s/ Kenneth W. Sukhia
KENNETH W. SUKHIA
United States Attorney

/s/ Steven H. Rosenbaum
STEVEN H. ROSEBAUM
Attorney, Voting Section
Civil Rights Division
Department of Justice
P. O. Box 66128
Washington, D.C. 20035-6128

/s/ Steven J. Mulroy
J. GERALD HEBERT
JAMES VIGIL
STEVEN J. MULROY
Attorneys, Voting Section
Civil Rights Division
Department of Justice
P. O. Box 66128
Washington, D.C. 20035-6128

The District Court Opinion entered May 29, 1992 is printed at p. 77a in the Appendix to the Jurisdictional Statement filed in *Wetherell v. De Grandy*, No. 92-519 (September 22, 1992).

The District Court Order and Judgment entered July 2, 1992 (Senate) is printed at p. 4a in the Appendix to the Jurisdictional Statement filed in *Wetherell v. De Grandy*, No. 92-519 (September 22, 1992).

The District Court Order and Judgment entered July 2, 1992 (House) is printed at p. 1a in the Appendix to the Jurisdictional Statement filed in *Wetherell v. De Grandy*, No. 92-519 (September 22, 1992).

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF THEODORE S. ARRINGTON, PH.D.

Theodore S. Arrington, Ph.D., first being duly sworn, deposes and says:

1. I am a citizen and resident of Mecklenburg County, North Carolina, and a judicially recognized expert in districting, reapportionment, and racial and partisan patterns in elections.

2. I have examined the document titled "The Voting Rights Act and Redistricting in Florida" produced by Election Data Services (EDS). There are a number of unanswered questions about the exact methods used in producing the data presented in this document. Nevertheless, assuming that proper methods were employed by EDS, it is possible to use these data to determine whether elections are racially polarized in Florida.

3. I have summarized the EDS data in Table 1 (page 2) of this affidavit. From Table 1 we can see that most elections involving Afro-Americans and Hispanics are racially polarized. Both Black/White contests and Hispanic/White elections are more than twice as likely to be polarized as not. Even contests involving only minority candidates are more likely to be polarized than not. It is clear that voting in these kinds of contests in Florida are usually racially polarized. Further examination of the EDS data indicates that the minority community is usually cohesive in these contests.

TABLE 1
SUMMARY OF ELECTION DATA SERVICES
POLARIZED VOTING DATA

	Black/ White Contests	Hispanic/ White Contests	No White Candidate
Polarized Voting:			
Minority Candidate Lost	18	10	
Minority Candidate Won	12	12	
Unclear Who Won	1	0	18
Total	31	22	
Voting Not Polarized:			
Minority Candidate Lost	7	5	
Minority Candidate Won	6	4	
Unclear Who Won	0	0	13
Total	13	9	
Grand Total	44	31	31

4. The question of the extent to which minority candidates lose because of racial polarization is more complicated in this case than in the *Gingles* case cited by EDS. In *Gingles* all of the jurisdictions had at-large voting in districts (County units) where black voters constituted a minority of the population. However, many of the Florida districts examined in the EDS data are majority black or Hispanic districts. Thus the win/loss ratios presented in Table 1 partially reduce the evidence in the EDS data for the necessity of constructing districts in which blacks or Hispanics are a firm majority of the voting age population if these groups are to be able to participate equally in the political process and elect candidates of their own choice.

5. Many of the election contests listed in the EDS data are not reflected in the figures in Table 1, because they did not present data from either homogeneous case analysis or from ecological regression for more than one racial group. The reason for the absence of some of these figures is not

clear. The data for one election were omitted because they are obviously in error.

6. The algebraic analysis presented by EDS to determine the size of the minority population which is necessary to form a minority majority district provides, at best, a rough minimum number for such districts. Ecological regression and homogeneous case analysis—even if done by the best accepted current standards—forms a rough estimate of turnout and racial voting. This is not clear from the EDS data which shows the figures to the nearest one-tenth of a percent. The use of existing registration data to form districts would also ignore the mobilization possibilities which exist when minority control districts are created. Thus I believe that it is best to form and evaluate minority districts on the basis of the minority percentage of the voting age population, and try to form as many districts as possible with a minority VAP at or above 55%.

7. I am more than 18 years of age and fully competent to testify to the things and matters herein stated.

This is the 28 day of April, 1992.

/s/ Theodore S. Arrington
THEODORE S. ARRINGTON, Ph.D

(Notary Stamp Omitted in Printing)

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

(Title Omitted in Printing)

AFFIDAVIT OF THEODORE S. ARRINGTON, PH.D.

Theodore S. Arrington, Ph.D., first being duly sworn, deposes and says:

1. I am a citizen and resident of Mecklenburg County, North Carolina, and a judicially recognized expert in districting, reapportionment, and racial and partisan patterns in elections.

CREDENTIALS OF THEODORE S. ARRINGTON

2. In the case of *Ralph W. Gingles, et al. v. Rufus L. Edmisten, et al.* (590 F.Supp. 345 [E.D.N.C.]), I testified as an expert witness and was so certified by the three judge panel that heard that case. Indeed, my testimony was cited by the Court in their unanimous opinion, which was affirmed by the United States Supreme Court (*Thornburg, et al. v. Gingles, et al.*, 106 S.Ct. 2752 [1986]). My testimony in that case included the presentation of proposed districts for the North Carolina General Assembly, which were drawn under my supervision and presented to the General Assembly by members of that body, and the effects of elections that could have been held in those districts on the success of black candidates.

3. I testified by affidavit as an expert witness in the case of *Kelly Alexander, Jr. v. James G. Martin, et al.* (Civil Action 86-1048-CIV-5) in the United States District Court (E.D.N.C. Raleigh Division). In that case I prepared

testimony on the racial effects of statewide elections for Superior Court in North Carolina. The General Assembly of North Carolina responded to that suit by creating judicial subdistricts for the nomination of Superior Court Judges in counties where majority black subdistricts were possible (see NOGS 7A-41). This response was similar to the proposals I offered in my testimony (except that I suggested election as well as nomination from these districts), and the subdistricts themselves were similar to those I drew for that testimony.

4. I am currently serving as an expert witness in the case of *Republican Party of North Carolina, et al. v. James G. Martin, et al.*, Civil Action No. C-87-779-G (1988). In that case I have testified by affidavit that the procedure of statewide elections of Superior Court judges dilutes the votes of Republicans while there are Republican voter majorities or near majorities in some districts and therefore has the effect of consistently degrading the votes of Republican voters and also degrades their influence on the political process as a whole in violation of constitutional rights.

5. In the combined cases of *Burton, et al. v. Sheheen, et al.* (No 3:91-2983-1), *South Carolina Reapportionment Advisory Committee, et al. v. Campbell, et al.* (No. 3-91-3310-1) and *Blanton, et al. v. Sheheen et al.* (No. 2-91-3635-1) in the United States District Court (S.C., Columbia Division [1992]), the three judge panel declared that a deadlock existed in the redistricting system in that state and proceeded to draw districts for the General Assembly and Congress for South Carolina. I was an expert witness for the coalition of plaintiffs in that case, testifying by affidavit and in the courtroom about the effects of delay in establishing districts and about the racial effects of various districting plans.

6. I have been hired by plaintiffs in the case of *Mackinnon v. Government of Prince Edward Island* before the

Supreme Court of Prince Edward Island, Canada. In that case I have prepared a redistricting proposal for the provincial legislature which follows one-person-one-vote standards. I will present testimony in court to support the idea that such districting is practical and necessary under the *Canadian Charter of Rights and Freedoms.*

7. In my vitae are listed several other voting rights cases in which I have been or currently am an expert witness.

8. I have served in an advisory capacity for a number of local governmental bodies to advise them on election systems, drawing districts, or reapportionment of existing districts. In this capacity I have helped these units bring their election systems into compliance with both the letter and the spirit of the Voting Rights Act.

9. I have edited one book and coauthored two monographs, published over twenty five articles, and delivered numerous papers in the last twenty years. Most of these works concern aspects of partisan and racial effects on voting and most of them concentrate on the South. Included in my research are several published studies of campaign finance. This work also examined racial and partisan variable in single and multi-seat elections, and was funded by the Foundation of the University of North Carolina at Charlotte and the State of North Carolina.

10. From 1979 to 1991 I was active in the administration of elections, having been appointed six times by the N.C. State Board of Elections to the Mecklenburg County Board of Elections. In the summer of 1985 I was elected Chairman of that Board and reelected to that post in 1987 and again in 1989. As Chairman of the three member Mecklenburg County Board, I was responsible for the admistration of the largest and most complex system of elections in North Carolina with a quarter of a million registered voters. Under my membership and chairmanship, the Mecklenburg Board continued its long tradition as a leader in establishing outreach programs to increase

voter participation in general and minority participation in particular. Many of the programs that have been mandated by various southern states, including North Carolina, had already been in place in Mecklenburg for years.

11. Candidates and campaign managers for local, state, and national office seek my advice and counsel on campaign techniques and procedures. I give training seminars and workshops on campaigning, and comment widely in the electronic and print media as an expert on elections. The demand for my services from these various sources derives directly from my knowledge of campaigning and elections, especially the partisan, racial, and districting factors that shape election results.

12. Commercial publishers request my services as reader for textbooks in my field on a regular basis, and I am a referee for such leading political science journals as *The American Political Science Review, The Journal of Politics* and *The American Journal of Political Science* among others. I help these editors to judge the quality of research on general politics, partisan and racial voting patterns, and the nature of multi-seat and single-member district election system.

13. My curriculum vitae will be submitted to the court as a separate document.

ONE-PERSON-ONE-VOTE ANALYSIS OF PROPOSED STATE AND COMMON CAUSE DISTRICTS

14. The courts have applied a standard of virtual population equality of census counts for Congressional districts (*Kirkpatrick v. Presler,* 394 U.S. 526 [1969] and *Karcher v. Daggett,* 462 U.S. 725 [1983]).

15. The courts have given us a maximum population deviation for state and local districts which is less strict than for Congressional districts (*Mahon v. Howell,* 410 U.S. 315 [1972]; *Gaffney v. Cummings,* 412 U.S. 735

[1973]) and *White v. Regester,* 412 U.S. 755 [1973]). A usual standard of 10% deviation from the largest to the smallest district is sometimes suggested as usual for state and local districts created by a legislative authority (*Brown v. Thomson,* 462 U.S. 835, 842-43 [1983]). When the courts do the districting, however, the ten percent deviation no longer applies:

> A court-ordered plan . . . must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features . . .
> . . . [U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan . . . with minimal population variance cannot be adopted. Chapman v. Meier, 420 U.S. 26-27; partially quoted in *Connor v. Finch,* 431 U.S. 417-410.

16. As indicated above, the total deviation standard in Congressional districting is zero. Deviation is defined as the difference between the largest and smallest district expressed as a percentage of the ideal district size (size of the state divided by number of districts). The deviation percentages for the Common Cause Congressional proposal is the zero percent deviation given as the judicial standard. As indicated below, the Common Cause plan achieves this absolute minimum deviation without unduly sacrificing other values such as provision for minority race and language minority opportunity districts, keeping other kinds of community of interests together, making compact districts, and so forth.

17. For the state legislative districts a comparison of the State plans with the Common Cause plan is possible. Taking the State Senate first, the deviation in the State plan is .45%. While one-half of one percent is not a large total deviation, it is important to note that the Common Cause plan has zero deviation. Yet the Common plan with its much lower total deviation avoids splitting 44 counties; and, as will be shown below, does a better job of providing opportunities for black citizens to participate equally in the political process and elect candidates of their choice. The Common Cause districts are at least as compact as the State's senate districts, and are likely to be more politically fair as well.

18. The State House of Representative plan drawn by the State has a total deviation of 2%. The Common Cause plan has a somewhat larger total deviation of 6.43%. However, the mean deviation in the State's plan is .52%, while the mean deviation in the Common Cause plan is .63%. Thus the plans taken as a whole have a roughly similar deviation. The largest deviations in the Common Cause plan are made specifically to avoid cutting up counties. There are 24 counties which are not divided on the Common Cause plan. Indeed, except for District 68 which is the largest district, the total deviation would be about 3%. District 68 was made somewhat larger than other districts in the Common Cause plan to keep the counties in that area intact. The desire to keep from unnecessarily dividing counties is a valid criteria in districting. It is not, of course, as important as the provisions of the Voting Rights Act; and does not take precedence over a reasonable one-person one-vote standard. In this case, however, it is clear (as shown below) that the Common Cause plan for the House is superior to the State plan in terms of provision for minority voters, and the total deviation in the Common Cause plan is not out of line with typical deviations in state legislative districting.

COMPLIANCE WITH THE VOTING RIGHTS ACTS BY PROPOSED STATE AND COMMON CAUSE DISTRICTS

19. The social and economic position of black citizens and language minorities in Florida disadvantages them in political terms. Compared to other citizens, they have lower family income, less education, higher rates of unemployment, higher rates of infant mortality, etc. Indeed, virtually every indicator of social and economic well being shows that blacks and language minorities are disadvantaged relative to other citizens. Historically blacks in Florida have suffered from both *de jure* and *de facto* segregation. One could compile a long list of both State initiated and private actions which have historically discriminated against blacks. This includes exclusion from the franchise and other forms of political participation and current social conditions is that blacks and language minorities are greatly disadvantaged in the political arena. This gives them less opportunity to participate in the political process as a whole and to elect candidates of their choice. Compared to other citizens they have lower rates of voter registration and voter turnout, are less likely to contribute money to candidates, and are less likely to run for office or otherwise participate actively in the political process. When these factors are combined with racially polarized voting, blacks and language minorities face an enormous barrier to equal participation and ability to elect candidates of their choice. The political position of racial and language minorities in Florida is basically similar to that of blacks in North Carolina as identified by the Court in the *Gingles v. Edmisten* case (590 F. Supp. 345 [1984]).

20. Districting may be used to equalize the opportunity for blacks and Hispanics to participate in the political process taken as a whole and allow them to elect candidates of their choice. Failure to draw districts as indicated in the two rules given below would deny blacks

and Hispanics that equal opportunity to participate and elect candidates of their choice.

21. The first rule is that districts should not crack black and Hispanic voting strength. As utilized by many southern legislatures in recent years, this practice has the effect of giving minority voters no real political voice beyond choosing among white anglo candidates. The idea is to keep the proportion of the voting population which is black or Hispanic low enough to prevent them from being elected.

22. Second, it is important to avoid packing districts with more black or Hispanic voters than is necessary to give them an opportunity to elect candidates of their choice. Such packing reduces the influence of minority voters on the surrounding districts by reducing the minority vote there. Often it is possible to create two districts with an opportunity for minority citizens to elect candidates of their choice if neither one is packed with majorities which are too great.

23. The U.S. Supreme Court originally suggested a standard of 65% minority population (POP) and 60% voting age population (VAP) within a single district as necessary to provide a minority population with a reasonable opportunity to "exercise political control over that district" (*United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 [1977]). These "super-majority districts" compensate for the lower voting age population percentages, lower voter registration, and lower voter turnout found in minority communities. As the courts have said:

> A guideline of 65% of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and has been specifically approved by the Supreme Court in circumstances comparable to those before us as representing the proportion of minority population reasonably required to insure minorities a fair opportunity to elect a candidate of their choice. (*Ketchum v.*

Byrne, 740 F.2d 1398, 1413-15, 9th Cir. [1984], cert. denied 471 U.S. 1135, [1985]).

On this same point also see *In re Congressional Districts Cases*, No. 8181 C 3915, slip op. at 14 (N.D. Ill., 23 November 1981); *Dickinson v. Indiana State Election Board* (7th Cir. 1991) 933 F. 2d 497, 503; *Romero v. City of Pomona, supra* 883 F. 2d 1418, 1452; *Solomon v. Liberty County, Florida* (11th Cir. 1990) 899 F. 2d 1012, 1018 (rehearing en banc); *McDaniels v. Mehfoud* (E.D. Virginia 1988) 703 F. Supp. 588, 592; *State of Mississippi v. U.S.*, 490 F. Supp. 569, 575 (D.D.C. 1979, three judge court), *affirmed* 444 U.S. 1050 (1980); and *Rybicki v. State Board of Elections*, 574 F. Supp. 1147, 1152 (N.D. Ill., 1983). Also see Brace, Grofman, Handley, and Niemi "Minority Voting Equality: The 65 Percent Rule in Theory and Practice" 10 *Law and Policy* 43 (1988).

24. Over the years experts have come to modify this rule somewhat in practice as Brace, Grofman, Handley, and Niemi indicate, because minority communities are now better organized and minority citizens more likely to register and vote than was true in an earlier era. It is not always necessary to have a 60% black voting age population (VAP) district to assure blacks the opportunity to elect candidates of their choice. Although a 60% black VAP is probably still a good goal, 55% black VAP is almost always enough for black citizens to have an opportunity to participate in the political process and elect candidates of their choice. One would certainly want a somewhat higher black VAP for Congressional districts than for the state legislature because of the greater organization and financing necessary to conduct a campaign at that level. In any case, it is clear that one would want to avoid having districts with more than 65% black VAP because such districts might be packed.

25. The situation with regard to Hispanics is somewhat more complex. The Hispanic population is diverse ethnically and racially, and there is not always the degree of cohesion that is present in the black population. Therefore, it is wise to keep the percentage of Hispanic voting age population relatively high to assure Hispanic participation. Hispanic VAPs in excess of 65% would not be unwise to assure Hispanic populations an opportunity to participate and elect candidates of their choice.

26. The higher the proportion of minority voters in a district, the greater the "influence." At some point "influence" becomes control, as indicated above. In the range below minority control the relationship between percent minority presence in the district and degree of influence is curvilinear. As the minority percentage in the district climbs from 0% the degree of influence is very slight. But the influence gradually builds in an upward curving fashion. At about the level of 30%, influence begins increasing rapidly with every 1% increase in percent minority. This curve of influence changes most rapidly as minority population becomes great enough to potentially nominate a minority candidate for one of the major parties. This kind of curve is common in many political situations. For example, it is the truncated bottom half of the "S" curve that typically describes the relationship between seats and votes for political parties in single member election systems.

27. If we wish to increase minority participation in the election process, we would want first to increase the number of minority control districts. Beyond that, the curvilinear relationship of influence to minority percentage suggests that the rest of the minority population should also be concentrated. Rather than cracking the remaining minority voters and splitting them into many districts, the districts should be drawn so as to form as many as possible with minority populations which are 55% to 60% minority VAP. Then we should try to

draw as many districts as possible with close to 55% minority VAP, and so forth. The majority/minority competition that often appears in districts that are "balanced" (i.e. 45-55% minority VAP) would increase minority interest and participation in the election process in those areas. Such a districting philosophy would provide for minority citizens—as much as possible—equality of participation in the political process taken as a whole and the ability to elect candidates of their choice.

28. In jurisdictions with manifest racial block voting, a history of racial and language group discrimination, and a present evidence of continuing social and economic disparity between white Anglos and Blacks and Hispanics, comparison of the plans in terms of racial and language group voting age population is desirable, for it is voting age population which is the basic unit that can be mobilized to produce minority voting majorities.

29. The Common Cause Congressional plan provides for one clear Black control district (#22), in which 60.4% of the voting age population is Black. There is also a district (#2) with a Black VAP of 36.4%. This second district is a weak influence district. The Black population in Florida appears to be so scattered, that additional effective Black control districts are difficult to draw.

30. There are two strong Hispanic control districts in the Common Cause Congressional plan. District 20 has an Hispanic VAP of 65.2%, and District 21 has a 69.9% Hispanic VAP. The Hispanic population is somewhat more concentrated than the Black population, but again additional effective Hispanic control districts are difficult to draw.

31. Table 1 (page 8) provides a comparison of Common Cause and State passed plans for the Florida legislature. The plans are compared using the minority VAP in the districts, and only those districts with more than 30% minority VAP are shown. Below the 30% level,

minority influence is negligible. The top portion of Table 1 shows the comparison for the State Senate. The State did not create a single clear Black control district for the Senate. Instead, they created two districts with a bare majority of blacks, and two other districts with some Black influence. Common Cause, on the other hand, drew one clear minority control district in line with the "supermajority" criteria enunciated in many court cases. They also drew three districts in which Blacks will be influential in determining the outcome of elections. The Common Cause approach is superior in that it provides for at least one district where Blacks can control the outcome without depending on white votes.

TABLE 1

COMPARISON OF MINORITY DISTRICTS IN PROPOSED PLANS RANK ORDERING OF CONTROL AND INFLUENCE DISTRICTS BY PERCENTAGE OF VOTING AGE POPULATION WHICH IS MINORITY

Institution:	Common Cause Plan		State Passed Plan	
Minority Group:	District	Minority VAP %	District	Minority VAP %
State Senate:				
Black	36	64.5	36	52.5
Districts:	8	41.7	30	51.7
	23	36.1	7	45.0
	32	34.4	40	34.5
Hispanic	39	79.5	39	76.1
Districts:	35	64.8	34	66.4
	38	63.1	37	64.2
State House:				
Black	97	67.9	108	60.5
Districts:	114	67.6	109	58.8*
	108	63.5	103	58.2*
	107	63.4	14	54.0
	15	58.6	84	53.2
	41	57.2	104	53.1
	64	55.6	59	52.0
	92	53.6	15	51.2
	17	52.8	39	50.2
	9	45.7	94	50.2

Institution:	Common Cause Plan		State Passed Plan	
Minority Group:	District	Minority VAP %	District	Minority VAP %
Black	54	35.8	93	50.0
Districts: (Cont'd)	113	34.2	55	46.9
	84	31.3	8	46.0
			118	31.7
Hispanic	117	83.7	110	83.6
Districts:	110	78.4	114	78.4
	109	75.3	111	76.6
	111	71.3	113	75.7
	105	70.8	117	60.2
	118	69.2	112	68.7
	115	67.4	102	65.7
	116	66.8	115	65.3
	104	60.6	107	63.8
	119	55.1	116	46.4
	106	35.1	109	38.4*
	59	31.1	58	31.0
			106	30.1
			103	30.0*

* These two districts appear in both Black and Hispanic lists for the state.

32. In terms of districts to increase Hispanic voters' opportunities to participate and elect, the State passed and Common Cause Senate plans appear to be quite similar.

33. The comparison of the State passed and Common Cause plans for the House of Representatives shows that the Common Cause plan is clearly superior (bottom of Table 1). The State passed a plan with only three house districts that have the minimal level of 55% Black VAP which would assure Black control, while Common Cause constructed seven such supermajority districts. Instead of creating at least a minimal number of Black "opportunity districts," the State opted to create a number of districts right at the 50% Black VAP level. These districts can only be considered "influence" districts.

34. Blacks typically register to vote at levels below that of the eligible white population, and the actual turnout of registered Blacks is typically lower than for registered whites. This "drop off" of Black participation means that a 50% Black VAP district will not have an effective Black voting majority.

35. The Common Cause and State passed House plans do not appear to be very different in terms of Hispanic districts. The list of Hispanic influence districts appears to be longer in the State plan, but this is deceptive. In the State plan Districts 109 and 103 have substantial Black majorities and substantial Hispanic minorities. Thus these two districts may be "packed" in the sense that the minority population in them is substantially more than is necessary for control. (Some Hispanics are Black, therefore I cannot determine whether these districts are packed from the data I have.) If the State is using the same districts for both Black control and Hispanic influence, the State effectively sets up a situation where minority groups have to compete with one another for influence. In any case, the list of minority control and influence districts created by the State is not as long as it looks because these two districts are listed twice.

CONCLUSION

36. In my professional opinion:

1. Although I have not seen any other Congressional plans for Florida using the 1990 census, the Common Cause plan is a reasonable plan providing opportunity for minority citizens to participate in the political process and elect candidates of their choice within a framework of districts that are exactly equal in terms of population. The districts are reasonably compact and were drawn to keep political communities of interest intact and to be fair to the political parties.

2. The Common Cause Senate plan is superior to the State passed Senate plan because it goes further in creating a Black control district and because it has no population deviation between the districts.

3. The Common Cause House plan is clearly superior to the State passed House plan, because it goes much further in creating Black control districts (seven versus three). Although the population deviations in the Common Cause plan are larger than in the State passed plan, this deviation is justified in terms of attempts to keep counties intact. Providing an opportunity for Black participation in the political process and to elect candidates of their choice is more important than the differences in population deviation between the State passed and Common Cause plans.

37. The data analyzed here are reliable and are of the kind that are usually relied upon by experts in this field to render opinions on the nature of legislative and congressional districts.

38. I am more than 18 years of age and fully competent to testify to the things and matters herein stated.

This is the 26th day of April, 1992.

/s/ Theodore S. Arrington
THEODORE S. ARRINGTON, Ph.D.

(Notary Stamp Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISRICT OF FLORIDA
TALLAHASSEE DIVISION

(Title Omitted in Printing)

REPORT TO THE SPECIAL MASTER BY THE INDEPENDENT EXPERT WITNESS

After finding exceptional circumstances in these consolidated cases, the Three-Judge Court of the United States District Court for the Northern District of Florida appointed The Honorable C. Clyde Atkins, Senior United States District Judge, Southern District of Florida, to serve as the Special Master. The Special Master was empowered to "consider and evaluate congressional redistricting and legislative reapportionment plans for Florida"; to hold hearings and receive evidence on these plans; and to recommend a redistricting plan "that a party or other interested party has proposed, or one that the Special Master has formulated based on the evidence and his expertise." Three-Judge Court's April 6, 1992 "Order Appointing Special Master," at 2-3, *De Grandy v. Wetherell* (No. 92-40015).

On April 24, 1992, Judge Atkins, in his capacity as Special Master, appointed me, pursuant to Rule 706, Federal Rules of Evidence, as the independent expert witness to review the proposed congressional redistricting plans for Florida and to present a report of my findings. His order further instructed me: "[I]f none of the plans appears adequate, [to] submit a proposed Congressional redistricting plan" of my own. The compressed time frame required that I perform these tasks between May 4 and May 14, 1992. *See* Special Master's April 24 "Order Appointing Expert Witness and Rescheduling Hearings,"

at 2, *De Grandy*; Special Master's May 8 "Order Memorializing Oral Ruling on Revised Dates," at 2, *De Grandy*. This Report is my response to those Orders.[1]

I. INTRODUCTION

I have reviewed the extensive legal memoranda (filed before, during, and after the hearings), expert reports and affidavits, other exhibits, arguments of counsel, and lengthy expert and lay testimony[2] presented in this case by the parties and the numerous amici curiae. I have also reviewed: the many proposed congressional redistricting plans; the maps, charts, overhead transparencies, voluminous statistics, and innumerable computer runs describing and comparing those plans and their variations; and the relevant rulings and orders issued by the Three-

[1] It is not without trepidation that I have undertaken the daunting task of evaluating, within a few days, plans that have taken the parties and the amici curiae months to prepare. Without in any way depreciating any of the many other experts who testified during the Hearings in this case, I observe that Professor Theodore Arrington analyzed the difficult and complex process of redistricting with an appropriate level of sophistication and humility. *See* Transcript of Hearings ["Tr."], vol. III at 4-97. I hope that I can approach his level of both. In particular, Professor Arrington was careful to observe that no one plan will ever be ideal. Tr., vol. III at 20. Similarly, I do not claim that the plan I recommend here is the only possible plan, though I do feel it has many virtues. *See* Part IV, below.

[2] Testimony by witnesses for the numerous parties and amici, along with extensive argument by their counsel, were presented in day-long Hearings before the Honorable C. Clyde Atkins from May 4th through 8th. On most days, the Hearings ran from 8:30 a.m. to 10:00 p.m. This allowed full participation by the many parties interested in this important process, while remaining within a compressed time frame dictated by the need to conduct the congressional elections on schedule. These Hearings produced a ten-volume transcript consisting of 2,198 pages, plus a huge collection of diverse exhibits of varying sizes and levels of technological sophistication.

Judge Court and by the Special Master.[3] Though counsel have zealously advocated the interests of their clients, often in a very adversarial manner, the extent of disagreement should not be overstated. Certain key factual and legal issues are beyond dispute in this case:

1. As a result of population increases from 1980 to 1990, Florida is entitled to twenty-three members in the upcoming 103rd United States Congress.
2. The current system, which contains only nineteen seats, is unconstitutional.[4] Attachment B contains a map showing the boundaries of the current congressional districts.
3. The Florida Legislature has failed to adopt a congressional redistricting plan, though a majority of the Florida House of Representatives did vote for a plan.
4. In this case, the demographic composition of the voting age population ["VAP"] of a district should be examined to determine whether or not it is an effective district. *See generally* Tr.; vol. III at 34-35 (Professor Arrington). *See also Solomon v. Liberty County*, 899 F.2d 1012, 1018 (11th Cir. 1990) (en banc) (Kravitch, J., specially concurring); *id.* at 1021 (Tjoflat, C.J., specially concurring).

[3] I have been ably assisted in this process by a political scientist/demographer (Dr. Douglas Rose), another law professor (Professor Terry Allbritton), several law clerks, and a small clerical staff. I was also given invaluable confidential, technical support by the Florida House of Representatives and Florida Senate computer analysts and technicians and by the staff of the Clerk of this Court. Naturally, I have made all policy decisions, and I take full responsibility for the analysis and conclusions contained in this Report. *See* Tr., vol. III at 104.

[4] *See* Three-Judge Court's April 30 "Order on Plaintiff's Summary Judgment Motion" at 2, *De Grandy*.

5. The "ideal" population size (to produce absolute population equality) for each of Florida's twenty-three new congressional districts is 562,-518.52 persons.[5]

6. All plans before the Special Master contain at least one district in which a majority of the VAP is African-American, plus two districts in which at least 64 percent of the VAP is Hispanic (that is, they are "supermajority districts"). *See* Attachment C; Tr., vol. I at 9. *See also* Stipulated Facts, ¶ 55.

7. A supermajority of the VAP is required for an Hispanic district to be effective, due to the large number of noncitizens and generally lower registration rates among Hispanics in Florida.

8. No African-American has been elected to Congress from Florida during this century, and the first Hispanic elected to Congress from Florida was elected in a special election held in 1989. *See* Stipulated Facts, ¶¶ 24-25.

9. The State of Florida has a history of legally enforced racial discrimination. For example, the Florida Constitution of 1885 provided for the racial segregation of schools, the collection of poll taxes, and anti-miscegenation laws. *See* Stipulated Facts, ¶ 43. Other statutes provided for segregation in railroad accommodations. *See id.*, ¶ 44 (citing Fla. Stat. § 350.20 (1967)). This discrimination is evidenced by the continuing need for contemporary supervision by a federal court of Dade County's School System in order

[5] As no fractional persons exist, an absolutely perfect zero population deviation is impossible for Florida's 1992 districts. That is, the lowest possible total deviation is one person, or .000177 percent. The deviations for the plans proposed in this case range from that minimum up to .07964%. *See* House Exhibit ["Ex."] 4, Tab 1.

to remedy past discrimination. *See* Stipulated Facts, ¶ 52.

10. This history of discrimination is reflected in the phenomenon of racially polarized voting, whereby African-Americans (or Hispanics) vote one way, and whites (or Anglos) vote another. *See Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) ("The essence of a submergence claim is that minority group members prefer certain candidates whom they could elect were it not for . . . a white majority that votes as a significant bloc for different candidates."); *see also* Common Cause Ex. 6 at 5-6 ("Both Black/White contests and Hispanic/White elections are more than twice as likely to be polarized as not. Even contests involving only minority candidates are more likely to be polarized than not [in Florida.]"); Stipulated Facts ¶¶ 24-25, 51-92.

11. Five of Florida's counties—Collier, Hardee, Hendry, Hillsborough, and Monroe—are "covered" by the formulas contained in section 4 of the Voting Rights Act, 42 U.S.C. § 1973b(b) (1982). Therefore, if the Legislature had passed a congressional redistricting plan, the plan would have required ' preclearance" by the United States Attorney General or the United States District Court for the District of Columbia under section 5 of the Act. *See* 42 U.S.C. § 1973c; 28 C.F.R. § 51.60(a), (b), & (c) (1990).[6]

The proposed congressional plans have traveled through these proceedings under a variety of names and numbers.[7] To reduce confusion, I will employ a uniform

[6] *See generally* Paul Hancock & Lora Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 Urb. Law. 379 (1985).

[7] Plans developed or stored in the Senate computer were given chronological numbers; those developed or stored in the House

set of titles to refer to the proposed plans.[8] The twelve plans are listed below, along with the various designations that have been used in this redistricting process, and the corresponding names that will be used in this Report:

A. NAACP plan (Plan 293), named after Plaintiff Florida State Conference of NAACP Branches.

B. De Grandy plan (Plan 212) and the second Reaves/Brown/Hargrett plan. These plans are exactly the same, and I will refer to them as the "De Grandy plan."

C. Humphrey plan (Plan 202) and the first Reaves/Brown/Hargrett plan (Plan 610). These two plans are exactly the same. They will be described here as the "Lawyers' Committee plan," because that is how they are designated on the House computer printouts and reports (where they are named after Humphrey's counsel, the Lawyers' Committee for Civil Rights Under Law).

D. Common Cause plan (Plan 40).

E. Wetherell plan (Plan 201). This plan, which was passed by the Florida House of Representatives but not by the Florida Senate, is sometimes described as the "House Plan" or "CS/HB 1-E" (Committee Substitute for House Bill 1E). I refer to it here by the last name of the Speaker of the House, Defendant/Third-Party Plaintiff T.K. Wetherell.

F. Margolis plan (Plan 287). This has, at times, been described as "one of the Senate plans,"

computer were given names, generally reflecting the names of those who developed or sponsored them.

[8] This attempt at clarification is not intended to ignore the fact that several plans have multiple sponsors, who have made important contributions to this redistricting process.

because its principal sponsor was Gwen Margolis, President of the Florida Senate. It is here referred to by her last name.

G. Gordon plan (Plan 279). This has also been described as "one of the Senate plans," because its principal sponsor was Jack Gordon, Chairman of the Florida Senate's Committee on Reapportionment. It is here referred to by his last name.

H. Reddick plan (Plan 296), named after Florida State Representative Alzo Reddick.

I. Ireland plan (Plan 285), named after Congressman Andy Ireland.

J. James plan (Plan 302), named after Congressman Craig James.

K. Webster plan (Plan 303), named after Amicus Daniel Webster.

L. AFL-CIO plan (Plan 295), named after the Florida AFL-CIO.[9]

Tables of basic statistics, describing the demographic composition and voting patterns for each district in each of these plans, appear in Attachments C and F. *See also* Senate Exs. 4-14 (color maps for each plan); Independent Expert's ["Indep. Exp."] Ex. 3 (filed with this Report).

II. CRITERIA USED TO EVALUATE THE PLANS

A. *Primary Criteria*

Federal law mandates that congressional redistricting plans must meet two primary requirements: the one-person, one-vote standard and the racial fairness standard.

[9] On the last day of the Hearings, the AFL-CIO withdrew its plan, in light of that plan's similarities to the Reddick, House, and Gordon plans. Tr., vol. VIII at 117-18.

See, e.g., Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991); *Major v. Treen*, 574 F. Supp. 325, 342 n.22 (1983) (three-judge court); *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Section 1992*, No. 79,674, slip op. 3, 12-13 (Fla. May 13, 1992); *In re Reapportionment of the Colorado General Assembly*, 1992 WL 48569 (Colo., Mar. 13, 1992); *Wilson v. Eu*, 823 P.2d 545, 549, 551 (Cal. 1992).

1. Equally Populous Districts

To satisfy the one-person, one-vote requirement, a state's congressional districts must be drawn so that their populations are equal. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (interpreting U.S. Const. art. I, § 2). Even *de minimis* deviations from exact population equality may be unacceptable, unless the deviations are necessary to achieve some critical state objective. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (rejecting deviation of less than .07%). *See also Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (only those population variances "which are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown" will be accepted).

The Florida Legislature has failed to adopt a congressional redistricting plan; therefore, any plan selected or produced by the *De Grandy* Three-Judge Court will be a court-made plan. Such a court-made plan should have only the most minimal deviation. *See Connor v. Finch*, 431 U.S. 407, 414 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 (1964); *Hastert*, 777 F. Supp. at 644 (rejecting plan with a deviation of .00297%). As several plans introduced in this case have demonstrated, a bare minimum deviation of one person, or .000177 percent, is technologically possible for Florida's congressional districts. Therefore, the plan adopted by the *De Grandy* Three-Judge Court should meet that standard, unless a

greater deviation is necessary to ensure racial fairness. *See Hastert*, 777 F. Supp. at 644.

2. Racial Fairness

A court-made plan must not have the intent or effect of diluting the votes of racial or language minorities. That is, it must protect minority voting strength. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982) (Senate Report on 1982 Amendments to the Voting Rights Act), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 204 [hereinafter "Senate Report"]; *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); Three-Judge Court's April 6 "Order Appointing Special Master," at 3, *De Grandy*.

a. *Constitutional Considerations*

Intentional discrimination in electoral schemes is prohibited by the Fourteenth and Fifteenth Amendments to the United States Constitution. Intentional discrimination may be indicated by the failure to create an African-American-majority or Hispanic-majority district solely to protect white incumbents. *See Ketchum v. Byrne*, 740 F.2d 1398, 1407 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Garza v. City of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge court). By contrast, protection of minority voting strength is a legitimate goal of redistricting. *United Jewish Orgs v. Carey*, 430 U.S. 144 (1977); *Garza*, 918 F.2d at 776; *Hastert*, 777 F. Supp. at 650-51.

b. *Section 2 Considerations*

Section 2 of the Voting Rights Act forbids any "state or political subdivision" to impose or apply any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or

abridgement of the right of any citizen . . . to vote on account of race or color," or membership in a language minority. 42 U.S.C. § 1973(a). There is an ongoing debate over the extent to which section 2 should be applied in cases such as the instant one, where the legislature has failed to redistrict, and, therefore, there has not been an outright challenge under the Voting Rights Act to an operative plan. Proponents on one side of this debate believe that a court engaged in congressional redistricting should undertake a full-blown section 2 analysis. *See Wilson*, 823 P.2d at 563 (special masters attempted to develop a plan "that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings"). At the other end of the spectrum lies the view that a court should avoid such wholesale incorporation because it "would impair the duality of remedies currently afforded aggrieved parties under principles of *res judicata* or separation of power." *Burton v. Sheheen*, No. 3:91-2983-1, slip op. 41 (D. S.C. May 1, 1992) (three-judge court).

There is no need for the Special Master to resolve this issue in the instant case. First, all parties and amici agree that section 2 must, at a minimum, *be considered* in crafting the redistricting plan. Tr., vol. II at 22. Second, the Three-Judge Court has instructed the Special Master to "recommend to the court a congressional redistricting . . . plan for Florida which comports with . . . the requirements of the Voting Rights Act. 42 U.S.C. § 1973 (1982) *et seq.*" Three-Judge Court's April 6 "Order Appointing Special Master," at 3, *De Grandy*. Furthermore, all parties agree that the Special Master should "respect minority concentrations," Tr., vol. II at 23-24, and all of their proposed plans include at least one African-American majority VAP district and two Hispanic supermajority VAP districts. *See* Attachment C; Indep. Exp. Ex. 3; Senate Exs. 4-14. Therefore, the Special Master's

task is to identify the best plan among those submitted, or to craft his own.

This middle-of-the-road approach comports with the instruction of the Supreme Court that "it is imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with the established constitutional standards, but also to allay suspicion and avoid the creation of concerns that might lead to new constitutional challenges." *Connor v. Finch*, 431 U.S. 407, 425 (1977).

Yet, a key decision still must be made. The various plans submitted to the Special Master by the parties and amici curiae take two different approaches to the creation of African-American districts. First, four of the proposed plans create two districts with an African-American VAP majority. Second, three of the plans take a different tack, by creating only one district with an African-American majority of the VAP, but also creating two or three other districts with a respectable, *i.e.*, more than 44 percent, African-American VAP. *See* Attachment C; Indep. Exp. Ex. 3. The proponents of these latter "influence" districts argue that it is more desirable for African Americans to have some say, *i.e.* influence, in several districts, rather than to constitute a majority in only two districts.[10]

I recommend that the Special Master and the Court choose the first approach. I believe it is appropriate in

[10] At first blush, *Wilson v. Eu*, 823 P.2d at 545, might appear to support this position. In *Wilson*, the court recognized the legitimacy "of forming minority *influence* districts to maximize the voting potential of geographically compact minority groups of appreciable size . . . even though the individual minority groups involved . . . were of insufficient size to constitute a majority in their voting districts." *Id.* (emphasis in original) (citations omitted). The special masters in *Wilson*, however, used influence districts to maximize minority voting strength, rather than as a substitute for drawing a possible minority-*majority* VAP district.

this case to include two African-American (or Hispanic) VAP majority districts because the NAACP, the Margolis, and other plans clearly demonstrate this can be done on a reasonable basis.

To fracture the African-American community into influence districts would merely continue the past dilution of minority voting strength. *Compare Jordan v. Winter*, 461 U.S. 921 (1983) (vacating three-judge court's influence district remedy,[11] and remanding for reconsideration in light of amendments to § 2); *with Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (affirming[12] use of majority African-American district as remedy). *See also United States v. Dallas County Comm'n*, 850 F.2d 1433, 1439-42 (11th Cir. 1988) (vacating district court's remedy, which included one at-large influence district, and adopting instead a plan with five single-member districts, including two African-American districts, two white districts, and one African-American "swing" district).

As Congress emphasized, section 2 was intended to remedy "completely" minority vote dilution by eliminating electoral schemes that prevent the election of minority-preferred candidates. Senate Report, *supra*, at 31. Creating "influence districts" simply does not further "Congress' intent of completely remed[ying] the prior dilution of minority voting strength." *See id.* Hence, section 2 is violated by an electoral "standard, practice or procedure," which impairs the ability of protected minority groups "to participate in the political process *and to elect representatives* of their choice." 42 U.S.C. 1973(b) (1982) (emphasis added). To ignore this language, by accepting a plan in which minority groups can only "influence" elections, merely perpetuates, albeit in a some-

[11] *See Jordan v. Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982) (three-judge court).

[12] *See Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984) (three-judge court).

what different manner, the submergence of Florida's African Americans in districts dominated by block-voting whites. Unless the level of African-American influence is quite high, i.e., nearly a majority, a white population can bloc vote against, and thereby defeat, minority-preferred candidates. *See generally Reynolds v. Sims*, 377 U.S. 533 (1964) (election of candidates is the true measure of electoral strength); *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11, 48 n.15 (1986). *See also* Tr., vol. V at 60-61 (Professor Richard Scher).

c. Section 5 Considerations

As this will be a court-made plan, preclearance is not required. *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981). However, the court should consider issues of possible retrogression in Florida's five "covered" counties. *See id.* at 148-49; Senate Report, *supra*, at 18-19. *See generally* House Ex. 4, Tab 4 (providing some statistics for comparing the proposed plans in this respect); Attachment E (figures for Independent Expert's Plan). See Part IV, below.

B. *Secondary Criteria*

In addition to the two critical statutory and constitutional requirements, several other factors, such as contiguity, compactness, respect for traditional boundaries (*e.g.*, county lines), maintaining communities of interest, and encouraging party competitiveness, may be considered.

1. Contiguity

Contiguity is not a serious concern in this case. *In re Apportionment Law*, 414 So. 2d 1040 (Fla. 1982), defined contiguity in the context of the *state* legislative reapportionment. The Florida Supreme Court found "that a '[d]istrict lacks contiguity only when a part is isolated from the rest by the territory of another district.'" *Id.* at 1051 (quoting *Mader v. Crowell*, 498 F.

Supp. 226, 229 (M.D. Tenn. 1980)). Very recently, the Florida Supreme Court went still further, explaining (again in the context of the state legislative boundaries) that contiguity

> does not impose a requirement of a paved, dry road connecting all parts of a district. Contiguity does not require convenience and ease of travel, or travel by terrestrial rather than marine forms of transportation.
>
> * * * *
>
> We hold, therefore that the presence in a district of a body of water without a connecting bridge, even if it necessitates land travel outside the district in order to reach other parts of the district, does not violate this Court's standard for determining contiguity under the Florida Constitution.

In re Constitutionality of Joint Resolution 2G, slip op. at 5, 6.

Furthermore, contiguity, even under these generous interpretations, is not required for Florida's congressional districts. In *Lund v. Mathas*, 145 So. 2d 871 (Fla. 1962), the court interpreted the provision of the state constitution requiring contiguous districts to apply "solely to the apportionment of the State Senate and State House of Representatives" and not to the redistricting of congressional seats. *Id.* at 873. Although the Florida Constitution has been revised and amended several times since *Lund*, the provision in the current version dealing with apportionment still applies solely to plans for the *state* legislature. *See* Fla. Const. Art. III, § 16 (emphasis added). Thus, there still is no Florida constitutional provision dealing with congressional reapportionment or redistricting.[13]

[13] Furthermore, the current relevant state statute is curative. It provides that any portion of the State which is not included within a congressional district, but is entirely surrounded by a district, is deemed to be included within that district. If the unlisted area is contiguous to two districts, it will be included in the least populated district. Fla. Stat. Ann. § 8.011 (1989).

Nor is there any federal requirement that congressional districts be contiguous. Article I, section 2, of the Constitution sets out no such standard. Courts construing that provision have held that contiguity is "appropriate," but they have *not* found it to be constitutionally mandated. *See Dunnell v. Austin*, 344 F. Supp. 210, 215 (E.D. Mich. 1972); *David v. Cahill*, 342 F. Supp. 463, 469 (D. N.J. 1972).[14]

Even though contiguity is not required, I nonetheless, recommend that any plan proposed by the Special Master and adopted by the Three-Judge Court include a more detailed provision on contiguity in order to cure any technical flaws that may have arisen in the heat of this redistricting process. *See* Attachment D (revised version of current statutory language, as suggested by legislative Staff).

2. Compactness

Geographic compactness is considered a functional, population-oriented determination. *Dillard v. Baldwin County Bd. of Educ.*, 686 F.Supp. 1459 (M.D. Ala. 1988). Thus, "the number and kinds of factors a court should consider may vary with each case, depending upon the local geographical, political, and socio-economic characteristics of the jurisdiction being sued." *Id.* at 1466. However, when districts are drawn with the express pur-

[14] Moreover, during the preclearance process, the Attorney General must examine whether a proposed change is unconstitutional. *See* 28 C.F.R. § 51.55(a) (1990). In *Dillard v. Town of Louisville*, 730 F. Supp. 1546 (M.D. Ala. 1980), the court noted that the Department of Justice had not imposed any objection to the Town's inclusion of a noncontiguous district to remedy minority vote dilution. *Id.* at 1546, 1547. Thus, even if the Special Master's Plan were subject to preclearance, which it is not, the inclusion of a noncontiguous district probably would not be fatal.

pose of protecting minority voting strength (a primary criterion), criticisms of district configurations based upon this (secondary) aesthetic criterion are misplaced. *Id.* The *Dillard* court found that compactness does not require "a proposed district [to] meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness." *Id.* at 1465. Instead, the focus of any geographic compactness analysis should be upon the size and relative concentration of the minority population, rather than upon the size or shape of the district. In fact, "racial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act." *Hastert*, 777 F. Supp. at 650-51. Mr. William Jones, the Common Cause expert in the instant case, viewed compactness as a very valuable goal in drawing districts, but recognized that deviations from that goal may be necessary in order to create minority districts. Tr., vol. II at 335. *See also* Tr., vol. IX at 153 (Dr. Hofeller) ("[C]ompactness is to fall in the face of the need to build minority districts."); Tr., vol. I at 86 (Dr. Paulson); *Burton v. Sheheen*, No. 3:91-2983-1, slip op. 80-81.

3. Respect for Traditional Boundaries

There is no requirement that traditional boundaries be followed in drawing congressional redistricting plans for Florida. *See In Re Apportionment Law, Senate Joint Res. No. 1305*, 263 So. 2d 77, 801 (1972). As with compactness, then, this may be a desirable approach but should not be used in a manner which undercuts one of the two primary criteria.

4. Communities of Interest

Communities of interest may be relevant to the determination of compactness. The California Supreme Court accepted that "the functional aspect of geographical compactness takes into account the presence or absence of a

sense of community made possible by open lines of access and communications." *Wilson*, 823 P.2d at 549. Members of a minority group who live in separate enclaves may still be included in a single district where it can be shown that they constitute a single community having similar interests. *See, e.g., Hastert*, 777 F. Supp. at 649 (Hispanic population split into two enclaves by "exogenous and institutional barriers" treated as single community for purposes of compactness).

5. Party Competitiveness.

Though Florida currently has more registered Democrats than Republicans, its elections reflect that it has developed into a strong two-party state. There was testimony regarding the importance of maintaining party competitiveness in Florida's congressional districts. *See, e.g.*, Tr., vol. III at 20-21; (Arrington testimony); Tr., vol. V at 121-22 (King testimony); Tr. vol. VII at 32-33 (Webster testimony). These three experts employed varying, but similar, methods to estimate the degree of party competitiveness for particular plans.

I conclude that the most direct measure of competitiveness for any of the submitted plans, and for the one I propose, is the difference in the percentage of the vote each candidate would have received if a highly competitive, partisan election were conducted in that plan's districts. Accordingly, I requested that the Senate Staff generate a table indicating what the outcome under each plan would have been in the 1988 senatorial race between McKay and Mack. The analysis groups the *actual votes* cast in that election into the districts for each of the plans submitted to the court and in the districts for my proposed plan. *See* Attachment F. *See also* Senate Exs. 23, 24. That Table reflects the difference in the percentage of votes each candidate received in the area now encompassed in a proposed district. In the table, a *lower* number means a closer vote and, therefore, a *higher* degree of competitiveness.

Of all the districts in all the plans, the range is from 0.1 percent (i.e., a rounded 50.0%/50.0% split) in district 13 for Plan 296 (the Reddick plan), to 47.2 percent (i.e., a 73.6%/26.4% split) in district 22 for Plan 302 (the James plan). In other words, the Reddick plan includes the most competitive district, while the James plan includes the least competitive district.

When the competitiveness of all districts for each plan is averaged, the mean difference for each plan results. These differences range from a competitive 14.8 percent in Plan 279 (the Gordon plan) to a less competitive 17.1 percent in both Plan 287 (the Margolis plan) and Plan 293 (the NAACP plan). *See* Attachment F.

III. REVIEW OF THE PLANS IN LIGHT OF THESE CRITERIA

Each of the plans listed in Part I is evaluated here in terms of the criteria discussed in Part II.

A. *NAACP Plan*

The NAACP plan was submitted by Plaintiff Florida State Conference of NAACP Branches. The plan contains two districts in which there are African-American VAP majorities. District 3, in northeast Florida, has a 54.8 percent African-American population, with corresponding 50.5 percent VAP, and 50.1 percent registered voter majorities. District 20 in Dade County has a 61.0 percent African-American population, with corresponding 56.4 percent VAP, and a 60.8 percent registered voter majorities. *See* Attachment C.

The NAACP plan also contains an African-American influence district. District 18 is a long, narrow district that runs along Interstate 95 from St. Lucie County to Broward County on Florida's east coast. District 18 has an African-American population of 50.8 percent, with a 44.9 percent VAP and a 39.6 percent registered voter plurality. *Id.*

This approach—two majority African-American districts and one influence district—is to be contrasted with the approach of the De Grandy and Lawyers' Committee plans. The latter plans create one African-American VAP majority district and three influence districts.

The NAACP plan also creates two Hispanic supermajority districts in Dade County, District 22 has an Hispanic population of 65.8 percent, with a 66.8 percent VAP.[15] District 23 has an Hispanic population of 66.8 percent, with a 66.9 percent VAP.

I believe the basic approach taken by the NAACP plan is sound. The plan creates two districts with majority African-American VAP, and two districts with supermajority Hispanic VAPs. However, the plan has an important technical flaw—it has a 0.02 percent deviation from absolute population equality. *See* House Ex. 4, Tab. 1. While this deviation is quite small, other plans taking the same basic approach have even smaller deviations. *See id.* Finally, the NAACP plan is one of the least politically competitive plans. *See* Attachment F.

Therefore, while the NAACP plan's basic approach is admirable, I cannot recommend adoption of this plan *in toto*. The NAACP plan as presently structured would be unacceptable as a court-made plan in this case, because of the 0.02 percent deviation from absolute population equality.

I stress that this rejection of a good plan on the basis of a 0.02 percent deviation may not be necessary in future cases. *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), discussed whether exact population equality is required. The California Supreme Court found that precise population equality, while desirable, was not mandatory for a constitutional redistricting plan. First, some deviations will be allowed

---

[15] No data was provided for this or any other plan regarding the registration rates of Hispanics in the State, because of the unreliability of such statistics.

if one is justified by "legitimate, consistently applied state and federal policies." *Id.* at 570. Second, technological advances now allow those parties who have sufficient resources to use very precise census data in drawing their plans (i.e., census blocks instead of larger census tracts), but the cost of such state-of-the-art equipment "would be prohibitive for any private person or group having resources short of those available to the legislature." *Id.* at 571.

The *Wilson* court found this second reason to be compelling in light of the interest under both California law and the Voting Rights Act in encouraging "[w]idespread participation in the redistricting process." *Id.* In the instant case, however, the sophisticated technology of the House and Senate computers has been made available to the parties and amici in preparing their plans. Also, several plans demonstrate that the bare minimum deviation for population equality can be attained while still protecting minority voting strength.

B. *De Grandy Plan*

The sponsor of Plan 212 is Miguel De Grandy, an Hispanic member of the Florida House of Representatives, and a named plaintiff in this case. Tr., vol. VI at 16; January 14, 1992 "Complaint for Declaratory and Injunctive Relief" at 3, *De Grandy*. The plan was also supported by Representatives Mario Diaz-Balart and Daniel Webster,[16] who testified during the Hearings, along with representatives of various other community organizations. Tr., vol. IV at 40.

The De Grandy plan establishes a single African-American influence districts (districts 3, 7, and 23), and two Hispanic supermajority VAP districts (districts 18

[16] Representative Daniel Webster is different from Amicus Daniel Webster, who proposed and presented his own plan. See Part III.K., below.

and 21). The African-American total population majority of 58.4 percent, an African-American VAP of 54.0 percent, and an African-American registration majority of 59.3 percent. The three African-American influence districts all have an African-American VAP of more than 44 percent; the largest VAP is 47.5 percent. District 3 has a total African-American population of 51.3 percent, a VAP of 47.5 percent, and a registration rate of 48.4 percent. The figures for districts 7 and 23 are, respectively: 51.8 percent total African-American population, 46.6 percent VAP, and 47.8 percent registration; and 50.9 percent total African-American population, 44.9 percent VAP, and 39.9 percent registration. *See* Attachment C.

The two Hispanic supermajority districts both have Hispanic VAPs which exceed 65 percent. District 18 has a total population that is 66.7 percent Hispanic, with an Hispanic VAP of 67.5 percent. District 21 is 69.6 percent Hispanic, with an Hispanic VAP of 70.6 percent. *See* Attachment C.

According to the De Grandy witnesses, the plan's minority districts were drawn first, taking into account existing concentrations of minorities. They testified that the African-American minority-majority district and the influence districts were fashioned around state legislative seats that have elected minority candidates. State House seats were used as building blocks for all districts, including the minority districts. In drawing the white Anglo districts, the plan sought to maintain communities of interest to the greatest extent possible.

The De Grandy plan builders viewed the state as having three regions: southern, central and northern. In the north, the plan creates an African-American influence district, that connects rural African Americans along its northern border and in the northeast corner of the state. A central Florida influence district sprawls from Orlando in the north, down into Osceola and Highlands County in the south, and then to Tampa and St. Petersburg in the west.

Moving south, the De Grandy plan creates two African-American districts: one influence and one majority. The influence district (district 23), runs through parts of St. Lucie, Martin, and Palm Beach counties, with a tail reaching south parallel to the coast, running through Broward County. The majority district (district 17) includes the area immediately to the north of Miami, with a tail that runs down through Miami and reaches south. This extension of district 17 is enveloped by district 18, one of the Hispanic majority districts.

The two Hispanic supermajority districts, as well as the African-American majority district, are wholly contained within Dade County. District 18 extends from the coast south of Miami down around the tip of the African-American majority district (district 17) and back up into West Miami. The other Hispanic district (district 21) encompasses the area to the west of Miami, including Hialeah and Kendall Lakes.

The paramount advantage of the De Grandy plan is its excellent treatment of Hispanics in Dade County. The plan recognizes the divisions that exist within south Florida's Hispanic community and preserves relatively homogeneous Cuban-African neighborhoods.

The De Grandy plan, however, has various disadvantages. First, the plan provides for only one African-American majority VAP district, although it does have three influence districts. Second, in the central Florida area, the Tampa and Orlando communities linked by the sprawling district are likely to have competing interests, particularly in the context of attracting new industries. Thus, the proposed central Florida influence district has been challenged on the ground that it combines minority populations which do not constitute communities of interest. *See* Tr., vol. III at 27 (testimony of Dr. McManus); Tr., vol. I at 113-14 (testimony of Mr. Russell). In addition, the African-American VAP in the influence district could be increased.

C. *Lawyer's Committee Plan*

The Lawyers' Committee plan consists of two identical plans, known as the Humphrey plan and the first Reaves/Brown/Hargrett plan. Sponsors of the Humphrey plan (Plan 202) are known in this litigation as the "Humphrey Intervenors." They are African-American citizens, registered to vote in the State of Florida, who assert that, because of malapportionment resulting from population changes, they are under-represented in the United States Congress. "Complaint for Injunctive and Other Equitable Relief" at 3-4, *De Grandy*.

The redistricting plan proposed by the Humphrey Intervenors was submitted by members of the legislative Black Caucus during the legislative session. As noted, the Humphrey plan is identical to Plan 610, and it is supported by the sponsors of that plan—Representatives Reaves, Brown and Hargrett.

This plan's geographic approach is to build an African-American majority district in the south, with influence districts in the northern, central and southern areas of the state. Both of the Hispanic supermajority districts are in the southern portion of the state. The creators of the Humphrey plan sought to craft four districts which had an African-American majority *in populaiton* by using the lines for existing State House seats already held by African-American legislators. May 11, 1992 "Notice of Filing Post Trial Memorandum of Plaintiff-Intervenors Gwen Humphrey et al." at 6. They argue that any unusually shaped districts were drawn "for the purpose of protecting black voting strength." *Id.* at 9.

The De Grandy and Lawyers' Committee plans are identical in nearly all aspects relevant to this Report. As George Meier, Staff Director of the Committee on Reapportionment for the Florida House of Representatives, testified, the only difference between the two plans is that the De Grandy plan moves a white Republican incumbent

into an open seat in district 16. Tr., VI at 163-64. House Ex. 1 (dealing the specific blocks involved). He testified that the only other distinction between the two plans were minor geographic changes involving an insignificant number of persons. Tr., vol. VI at 162-64.

As a result, the population, VAP, and registration data for the African-American majority district (17), African-American influence districts (3, 7, 23), and the Hispanic supermajorities (18 and 21) in the Lawyers' Committee plan are identical to those listed above in the description of the De Grandy plan. See Part III.B., above. Also, both plans have a mean difference of 16.6 percent on the competitiveness scale. *See* Attachment F.

The slight differences in the De Grandy plan do, however, produce a minimal difference in population deviation. The De Grandy plan has a slightly higher deviation (0.00071%) than does the Lawyers' Committee plan (0.00018%). *See* House Ex. 4, Tab 1.

The Lawyers' Committee plan is disadvantageous in that it provides for only one African-American VAP majority district, while other plans (Ireland, Margolis, NAACP and James) have shown that two or more are possible.

D. *Common Cause Plan*

The Common Cause plan was sponsored by that national public advocacy group, which appears as amicus curiae in this case. The plan contains one district, located predominantly in Dade County, with an African-American supermajority. District 22 has an African-American total population of 65.3 percent, with 60.4 percent VAP, and 63.1 percent registered voter majorities. The plan also contains one African-American influence district, which runs along the Georgia border in extreme north Florida. District 2 has an African-American population of 39.6 percent, with 36.4 percent VAP, and 37.3 percent registered voters. *See* Attachment C.

The Common Cause plan also contains two districts, both predominantly in Dade County, with Hispanic supermajorities. District 20 has an Hispanic population of 64.2 percent, with 65.2 percent VAP. District 21 has an Hispanic population of 68.7 percent, with 69.9 percent VAP. *See* Attachment C.

The Common Cause plan creates majority districts for African Americans and Hispanics only in southern Florida. Common Cause drew these three districts, plus the African-American influence district, first. Then, districts were drawn throughout the remainder of the State, guided by Common Cause's principle of keeping counties together, except when a split had to be made to comply with the one-person, one-vote requirement.

The Common Cause plan achieves the minimum possible deviation possible—one person. *See* House Ex. 4, Tab 1. However, Common Cause's fairly strict adherence to county boundaries has prevented it from creating a second district with an African-American VAP majority. Several other plans were able to create this second African-American majority district, while still achieving the minimum deviation. Common Cause's demographer, Mr. Jones, and its expert, Professor Arrington, admitted it was not the best plan and recognized that its principal shortcoming was failure to create more minority districts. Tr., vol. II at 298 (Jones); Tr., vol. III at 14-15 (Arrington).

Therefore, I do not believe the Common Cause plan should be adopted as a whole. The treatment given to central Florida by Common Cause does, however, appear quite workable.

E. *Wetherell Plan*

The Wetherell plan was submitted by T.K. Wetherell, Speaker of the Florida House of Representatives, and Peter R. Wallace, Chairman of the Reapportionment

Committee. Neither the Special Master nor the Three-Judge Court is required to give this plan any special deference beyond that accorded to other plans. As it was passed by only one house of Florida's bicameral legislative, this is not a "legislative plan" within the meaning of *McDaniel v. Sanchez*, 454 U.S. 130 (1981). *See Upham v. Seamon*, 456 U.S. 37, 40-41 (1982); *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Cook v. Luckett*, 735 F.2d 912, 917 (5th Cir. 1984).

Article III, § 7, of the Florida Constitution requires that a bill be passed by majority vote in each house of the State Legislature. Having passed both houses, the bill must be presented to the Governor of Florida for his approval, or inaction, before it becomes law. *See* Fla. Const. art. III, § 7. *Cf. Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1982), and *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. ——, 111 S. Ct. 2298, 115 L. Ed. 2d 236 (1991) (bicameralism under the United States Constitution).

Because the Florida Constitution mandates bicameral action by the Legislature and subsequent presentment to the Governor as prerequisites, any judicial deference to the House plan would necessarily usurp the proper law-making roles of the State's Senate and Executive Branch. *See generally Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (Because congressional redistricting is a lawmaking function subject to the state's constitutional procedures, plan passed by both state houses but vetoed by governor was only " 'proffered current policy' rather than clear expressions of state policy.")

In terms of minority representation, the Wetherell plan has one African-American VAP majority district. In that district (district 20), 60.2 percent of the total population, 55.3 percent of the VAP, and 60.4 percent of the registered voters are African Americans. *See* Attachment C. The Wetherell plan has two African-American influence

districts. In the first (district 15), 50 percent of the total population, 44.3 percent of the VAP, and 39.8 percent of registered voters are African Americans. District 3 appears to be a very weak influence district, in which American Americans are only 36.9 percent of the district's total population, 33.3 percent of its VAP, and 34.6 percent of its registered voters.

The Wetherell plan has two Hispanic supermajority districts—district 17, in which Hispanics are 65.1 percent of the VAP, and district 18, in which Hispanics are 64.8 percent of the VAP. *See* Attachment C.

The House opted for policy choices rather than strictly legal considerations to guide their drafting of the Wetherell plan. Compactness, coherent communities of shared interests, and the ways in which counties and cities were divided had significance. The mean difference for the MacKay/Mack election would have been 15.9 percent, *see* Exhibit F, though some other scales ranked it as less competitive.

F. *Margolis Plan*

The Margolis plan was submitted by Defendant Gwen Margolis, President of the Florida Senate. The plan proposes two African-American majority districts. District 3, in north Florida, has a 54.5 percent African-American total population, a 50.1 percent African-American VAP, and a 50.1 percent registered voter majority. District 3 contains the African-American population areas of Gainesville, Jacksonville, Dayton Beach, and Orlando. District 22, in south Florida, has a 67.2 percent African-American population, 62.2 percent African-American VAP, and 62.9 percent registered voter majority. *See* Attachment C. The district is located in Dade and Broward counties.

The Margolis plan also proposes the creation of two south Florida Hispanic majority districts. District 20 has

an Hispanic population of 64.0 percent and an Hispanic VAP of 64.3 percent. District 20 is located in part of Dade County and in the southern portion of Collier County. *See* Indep. Exp. Ex. 3. The second Hispanic majority district, district 21, has an Hispanic population of 65.0 percent and an Hispanic VAP of 66.4 percent. *See* Attachment C. District 21 is located in five counties —Dade, Broward, Collier, Hendry and Palm Beach.

Proponents of the Margolis plan claim that it balances the need to provide minority groups access to the political process with the maintenance of political parity and the formation of compact political districts. *See* Defendants' Margolis and Gordon, Apr. 24, 1992 "Memorandum of Law in Support of SJR 2G and Plan 287." To a limited degree, the plan has achieved this goal. Two African-American and two Hispanic VAP majority districts have been created. District 3, in north Florida, is quite well-designed, though its African-American VAP percentage could have been increased somewhat with little effort.

The weakness of the Margolis plan, however, involves its method of forming the two south Florida Hispanic districts. Both districts are created by combining Dade County Hispanic neighborhoods with areas in predominantly non-Hispanic, adjacent counties. The division of Dade's Hispanic neighborhoods among five congressional districts seriously damages the community of interest of these neighborhoods. Also, the inclusion of areas of high Anglo growth, such as Naples in district 20, creates the possibility of ethnically divided political races. *See* Tr., vol. III at 283. Furthermore, transferring several hundred thousand Dade Hispanics into non-Hispanic districts greatly reduces the likelihood that these voters will be able to elect candidates of their choice.

G. *Gordon Plan*

The Gordon plan was submitted by Defendant Jack Gordon, Chairman of the Florida Senate's Committee on

Reapportionment. The Gordon plan and the Margolis plan are substantially similar, except the Gordon plan does not contain a north Florida African-American majority or influence district The Gordon plan proposes one African-American majority district, district 22, in south Florida. District 22 has a 67.4 percent total African-American population, a 62.4 percent African-American VAP, and a 63.2 percent registered voter majority. *See* Attachment C.

The plan also proposes the formation of two Hispanic majority districts in south Florida that are nearly identical to the Hispanic districts in the Margolis plan. District 20 has a 64 percent Hispanic population and a 64.3 percent Hispanic VAP. District 21 has a 65.3 percent Hispanic population and a 66.3 percent Hispanic VAP. *See* Attachment C. These districts have the same disadvantages as their Margolis counterparts. *See, e.g.*, Tr., vol. IX at 174-75 (Dr. Thomas Hofeller).

The Gordon plan has two major deficiencies. Like the Margolis plan, the Gordon plan decreases the access of Dade County Hispanics (especially Cubans) to the political process by "cracking" them into five congressional districts which extend beyond Dade County. The second deficiency is the failure of the Gordon plan to draw a second African-American majority district, as several *other plans have done*. *See* Tr., vol. III at 57.

H. *Reddick Plan*

The Reddick plan was submitted by Alzo Reddick, State Representative from Orlando. The plan creates one African-American majority district, district 22, in south Florida. District 22 has an African-American total population of 57.7 percent, an African-American VAP of 52.6 percent, and a 55.7 percent registered voter majority. *See* Attachment C. District 22 is located in Dade and southeast Broward counties. The Reddick plan also creates an

African-American influence district, district 2, in north Florida. In that district, 39.7 percent of the total population is African American, 36.3 percent of the VAP is African American, and 37.3 percent of the registered voters are African American. *See* Attachment C. The district is located primarily on the Georgia-Florida border, and it combines several rural counties with some African-American population areas of Duval County.

The Reddick plan also contains two Hispanic majority districts, 20 and 21, that are located primarily in Duval County. District 20 has an Hispanic population of 64.6 percent and an Hispanic VAP of 65.7 percent. District 21 has an Hispanic population of 68.5 percent and an Hispanic VAP of 69.5 percent. *See* Attachment C.

The Reddick plan is a derivative of the Common Cause plan, and like the Common Cause plan, it attempts to prevent the splitting of counties when drawing congressional districts. By emphasizing compactness and respect for county boundaries over the formation of minority districts, the Reddick plan creates compact, regularly shaped districts that often follow county boundaries. *See* Tr., vol. VIII at 130-33.

The weakness, however, is that the Reddick plan minimizes the ability of minority groups, particularly African Americans, to participate in the political process. The Reddick plan creates only one African-American majority district and one African-American influence district. Other than districts 2 and 22, the plan contains no district with an African-American VAP above 20 percent, and even the influence district has a small African American VAP (36.3 percent). *See* Attachment C. I believe the Reddick plan would not create the best opportunities for Florida's African Americans to elect candidates of their choice.

I. *Ireland Plan*

The Ireland plan was submitted by Intervenor Andy Ireland, Congressman from current district 10. The plan was prepared by Dr. Thomas B. Hofeller, Director of Redistricting for the National Republican Congressional Committee.

Under the Ireland plan, two African-American majority districts (districts 6 and 22) and one African-American influence district (district 2) are created. District 6 has an African-American total population of 56.1 percent, an African-American VAP of 50.8 percent, and a 52.1 percent registered voter majority. *See* Attachment C. District 6 is an extremely long, irregularly shaped district that extends from Palm Beach County in south Florida to Volusia County in central Florida and from St. Lucie County on the Atlantic Coast to Pinellas County on the Gulf Coast. It has some of the same disadvantages as the sprawling central Florida district contained in the De Grandy plan.

The second African-American majority district (district 22) is located in northeast Dade County and southeast Broward County. District 22 has an African-American population of 67.5 percent, an African-American VAP of 62.3 percent, and a registered voter majority of 62.6 percent. *See* Attachment C.

The African-American influence district (district 2) has a total African-American population of 50.5 percent, an African-American VAP of 46.7 percent, and an African-American registered voter percentage of 48.2. *See* Attachment C. District 2 is primarily located along the Florida-Georgia border, but it extends south into Marion and Volusia counties and east into the African-American population areas of Duval County. *See* Indep. Exp. Ex. 3.

Like other plans submitted to the Special Master, the Ireland plan creates two Hispanic majority districts that

are located in Dade County. District 20 has a total Hispanic population of 65.9 percent and an Hispanic VAP of 67.3 percent. District 21 has a total Hispanic population of 71.4 percent and an Hispanic VAP of 72.1 percent. *See* Attachment C.

Proponents of the Ireland plan, a derivative of the Common Cause plan, contend that it attempt to maximize the number of minority-majority and influence seats. Two African-American and two Hispanic majority and one African-American influence district are theoretically formed by the plan. It is questionable, however, whether these districts will be effective. District 6 is particularly troublesome. This long, irregularly-shaped district traverses parts of seventeen counties and involves three major media markets. These barriers may enhance the difficulties that at candidate with limited resources would face. Additionally, the district contains several areas in which the rate of growth in the white community is expected to be large. Whether the African-American community will be able to maintain the 50.1 percent VAP majojrity in district 6 through the next decade is questionable. In the MacKay/Mack Senate race, the mean difference for the Ireland plan would have been 16.5 percent. *See* Attachment F.

J. *James Plan*

Craig T. James, Congressman from the current Fourth District of Florida, sponsored this plan as amicus curiae. The James plan provides for two African-American majority districts, in districts 2 and 22, and no influence districts. District 2, in north Florida, has a total African-American population of 58.6 percent, with an African-American VAP of 54.8 percent. African Americans account for 55.6 percent of registered voters. *See* Attachment C. The second African-American majority district, district 22, has a total African-American population of 65.0 percent, and an African-American VAP of 59.5 percent and a 60.2 percent African-Americans registered voter majority. *See* Attachment C.

The James plan also creates two Hispanic supermajorities in districts 20 and 21, both in Dade County. Tr., Vol. IX at 200. District 20 has a total Hispanic population of 65.8 percent and an Hispanic VAP of 67.1 percent. The second Hispanic supermajority district, district 21, has a total Hispanic population of 70.6 percent and an Hispanic VAP of 71.4 percent. *See* Attachment C. The James plan has a total population deviation of 0.00036 percent. *See* House Ex. 4, Tab 1.

The basic theme behind the James plan was a desire to maintain the present district structure where possible and to leave incumbent districts intact. Tr., Vol. IX at 198-200. The James plan would have a mean difference in the MacKay/Mack race of 16.6 percent. *See* Attachment F. A favorable aspect of the James plan is that it creates two African-American majority districts. However, it creates no influence districts.

K. *Webster Plan*

The Webster plan was submitted by amicus curiae Daniel Webster, who presented the plan himself, with no expert testimony. *See* Tr., Vol. X at 109. The plan creates only one district with an African-American majority. District 20, located predominantly in Dade County, has an African-American population majority of 62.4 percent, with an African-American VAP of 57.6 percent, and a registered voter majority of 62.0 percent. The Webster plan does not create any other districts with an African-American VAP of 35 percent of more. *See* Attachment C.

The Webster plan creates two Hispanic supermajority districts. District 17, composed of portions of Dade, Collier, and Hendry Counties, has an Hispanic population of 64.6 percent, with a VAP of 65.0 percent. District 18,

located within Dade County, has an Hispanic population of 64.7 percent, with a VAP of 65.3 percent. *See* Attachment C.

The plan focuses on central and north Florida. Webster claims that there was insufficient computer time available to remap the entire state. April 17, 1992 "Notice of Filing Map and Population Statistics, and Memorandum of Daniel Webster 1," *De Grandy*. Webster argues that he chose not to create an African-American influence district in north or central Florida to avoid "packing" African Americans into a single district. *Id*. at 2.

The Webster plan should not be adopted by the Court. It has a deviation of .00124, *see* House Ex. 4, at Tab 1, and it does not comply with the mandates of the Voting Rights Act. The Webster plan merely perpetuates the traditional cracking of African-American voters, by keeping them submerged in heavily white districts.

IV. THE PROPOSED INDEPENDENT EXPERT PLAN (PLAN 308)

The plan I propose does not reinvent the wheel; rather, it is assembled from key portions of other plans—De Grandy, Common Cause, Margolis, and NAACP. This plan (designated at Plan 308 by the Senate computer) takes the NAACP and De Grandy approach to African-American districts, by including two African-American VAP majority districts, plus one influence (or plurality) African-American VAP district. It follows the De Grandy approach, with some modifications, in South Florida, thereby keeping Cuban-American communities together and creating two Hispanic supermajority districts, plus one African-American VAP majority district in Dade County. Some adaptations, however, were necessary to take account of transportation connections and development patterns in south Florida. My proposed plan follows the lead of the Margolis plan with respect to the African-

American majority district in north Florida, but it somewhat adapts that district based upon changes inspired by the NAACP plan. It generally employs the Common Cause approach to central Florida.

A. *Geographic Description with Emphasis upon Lineage and Derivation from Other Plans*

The proposed Indeepndent Expert Plan (Plan 308) basically divides the State of Florida into three parts—southeast (from Key West to Palm Beach County), central (from the Gulf Coast to Brevard County on the east coast), and north (above Orlando) Florida.

The southeastern portion of the plan (districts 17-23) is largely derived from the De Grandy plan but with important changes in the African-American influence district (district 23), which were inspired by the NAACP plan. Also, Monroe County was removed from De Grandy district 15 and transferred to Independent Expert district 20, so as to reflect development patterns along the east coast. Those two changes required certain detailed adjustments in order to ensure zero deviation among the resulting districts.

The central Florida portion of the Independent Expert Plan (districts 9-16) is derived from the Common Cause plan. The interface between the adapted De Grandy plan and the Common Cause plan, plus the zero deviation requirement, mandated certain boundary adjustments, especially for districts 8 and 16.

The north Florida portion of the Independent Expert Plan (districts 1-8) is derived from the Margolis plan. However, several adjustments were made to district 3 to increase the African-American VAP majority and registration levels. Again, these changes were largely inspired by the NAACP plan. These changes, plus interface adjustments (at points where the borrowed Margolis plan districts meet the borrowed Common Cause plan districts)

required minor adjustments to satisfy the zero deviation requirement.

Districts 17, 18 and 21 in the Independent Expert Plan are virtually identical to the same-numbered districts in the DeGrandy plan; districts 10, 11, 13 and 14 in the Independent Expert Plan are virtually identical to the same-numbered districts in the Common Cause plan; and districts 1, 2, 4 and 7 in the Independent Expert Plan are virtually identical to the same-numbered districts in the Margolis plan. Furthermore, district 22 is similar to district 22 in the De Grandy plan and districts 5 and 6 are similar to the same-numbered districts in the Margolis plan. *Compare* Attachment C (statistics for other plans) with Attachment G (statistics for Independent Expert Plan). *See also* Attachment A (map of Independent Expert Plan); Indep. Exp. Ex. 1 (color maps and statistics). By following the district lines of other plans wherever possible, I have attempted to make it easier for the parties and amici to analyze the implications of my proposed plan based upon the evidence already in the Record.

B. *Demographic Analyses*

As noted above, the Independent Expert Plan creates two supermajority Hispanic districts (districts 18 and 21). District 18 has an Hispanic VAP of 67.5 percent, and district 21 has an Hispanic VAP of 70.6 percent. *See* Attachment G; Independent Exp. Ex. 1. Based upon testimony regarding the De Grandy and Lawyers' Committee plans, I believe these are reasonable numbers for an effective Hispanic district.

The Independent Expert Plan also creates two African-American majority VAP districts—one in south Florida (district 17) and one in north Florida (district 3). *See* Attachments A and G; Indep. Exp. Ex. 1. District 17, in Dade County, has a total African-American population of 58.4 percent, VAP of 54.0 percent, and registration of

59.3 percent. District 3 has an African-American total population of 55.0 percent, VAP of 50.6, and registration of 50.6. *See* Attachment C. It is, therefore, an improvement over the comparable districts in the Margolis plan. In addition, the Independent Expert Plan creates one African-American influence district (district 23) with a substantial VAP of 45.7 percent. It, therefore, is an improvement over the influence district proposed by the De Grandy plan. *See* Attachments C and G.

C. *Retrogression Analysis*

As noted above, any plan adopted by the Three-Judge Court will be a court-made plan, and, therefore, will not have to be submitted for preclearance. See Part II.A(2)(b), above. Yet, retrogression should be considered. Only five Florida counties—Collier Hardee, Hendry, Hillsborough, and Monroe—are "covered jurisdictions" within the meaning of the Voting Rights Act. Some have argued that a preclerance examination should involve only those five counties. *See* April 24, 1992 "Brief of Intervenor Florida AFL-CIO," at 6 n.2, *De Grandy*. Others have maintained that the entire redistricting plan must be examined for compliance with section 5's standards. *See* April 23, 1992 "Memorandum of Law in Support of Redistricting of Plans Submitted by Plaintiffs-Intervenors Gwen Humphrey *et al.*," at 10-11, *De Grandy*.

I decline to enter this debate because, from a practical viewpoint, some level of review of the entire plan is necessary in the instant case. Florida's population growth has resulted in four additional congressional seats. This plan (and the others) are *statewide* congressional redistricting plans, whose districts must all have the same population. See Part II.A(1), above. Therefore, no one district can be examined or changed in isolation. Furthermore, none of the districts in the plan I propose (or in any other plan submitted to the Court, for that matter) is identical, that is, coterminous, with any district existing under the 1982

congressional plan. *See* Attachments A, B, and E. Thus, there can be no simple numerical test for retrogression.

My proposed plan (like many of the plans submitted to the Special Master) increases both Hispanic and African-American political representation, when the Florida congressional delegation is considered as a whole. That overall increase has been possible only by a remapping of the districts. In the process of remapping, some minorities in Florida's covered jurisdictions may constitute marginally less of a district (or districts) than before and some of those minorities may constitute *more* of a district (or districts) than before. *See In re Constitutionality of Senate Joint Resolution 2G*, slip op. 17. But, overall, the plan can substantially increase the level of political participation and electoral representation for the members of minority groups in Florida. Therefore, I believe the plan does not produce retrogression.

D. *Party Competitiveness Analysis*

Employing the measure described in Part II.B(5), above, the Independent Expert Plan contains districts ranging in competitiveness from 0.9 percent in district 12 to 43.1 percent in district 17. The overall competitiveness of the plan, i.e., is the mean difference, is 15.9 percent. This compares favorably to the mean of 16.1 percent and median of 16.5 percent for the other plans. *See* Attachment F.

Additionally, it is somewhat more competitive than the mean competitiveness (16.3 percent) of its three base plans (Margolis, De Grandy and Common Cause). More specifically, in the seven districts (1 through 7) derived from the Margolis plan, it is slightly more competitive (17.9 percent) than the Margolis plan (18.0 percent). In the seven districts (9 through 15) adapted from the Common Cause plan, the Independent Expert Plan is also slightly more competitive (9.8 percent) than the Common

Cause plan (9.9 percent). In the seven districts (17 through 23) derived from the De Grandy plan, the Independent Expert Plan is more competitive (20.5 percent) than the De Grandy plan (20.7 percent). Finally, in the two districts 8 and 16) with mixed parentage, the Independent Expert Plan is competitive (17.2 percent and 8.9 percent, respectively).

More important criteria than competitiveness were utilized in designing the districts in this proposed plan. *See* Part II.A., above. After the primary criteria have been addressed, however, competitiveness is a consideration in measuring the voters' ability to elect *and* to hold accountable the representative of their choice. I believe the Independent Expert Plan provides improved competitiveness within the strict parameters imposed by meeting the primary redistricting criteria.

V. CONCLUSION

For the foregoing reasons, I urge the Special Master and the Three-Judge Court to adopt this plan for Florida's congressional redistricting.

Respectfully submitted this 14th day of May, 1992.

/s/ M. David Gelfand
M. DAVID GELFAND
Independent Expert Witness

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSE DIVISION

(Title Omitted in Printing)

DECLARATION OF ALLAN J. LICHTMAN

Pursuant to 28 U.S.C. 1746, I, Alan J. Lichtman, declare that:

1. I have been retained by the United States in connection with the above-captioned case.

2. A true copy of my curriculum vitate is attached hereto.

3. I have been informed by counsel for the United States that I may be called upon to testify as an expert witness on behalf of the United States in this case. My anticipated testimony may be in one or all of the following areas:

A. The opportunities afforded minority voters to participate effectively in the political process and to elect candidates of their choice under the legislative plans enacted by the State of Florida, as well as the election opportunities afforded minority voters under alternative plans offered by any other party.

B. The validity of any methodology used by expert witnesses in this case to assess the viability of minority districts in the State of Florida.

C. Population growth and the viability of election districts created or proposed in the Dade County area, particularly the impact of such districts on the Hispanic population.

D. Standards and principles of racial vote dilution, and whether voting patterns in the State of Florida are characterized by racial or ethnic polarization.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN

Executed on this 22 day of June, 1992.

Curriculum Vitae

Allan J. Lichtman
9219 Villa Dr.
Bethesda, MD 20817

(301) 530-8262 h
(202) 885-2401 o

EDUCATION

BA, Brandeis University, Phi Beta Kappa, Magna Cum Laude, 1967

PhD, Harvard University, Graduate Prize Fellow, 1973

PROFESSIONAL EXPERIENCE

Teaching Fellow, American History, Harvard University, 1969-73

Instructor, Brandeis University, 1970, quantitative history.

Assistant Professor of History, The American University, 1973-1977

Associate Professor of History, The American University, 1977-78

Professor of History, The American University, 1978-

Associate Dean for Faculty and Curricular Development, College of Arts & Sciences, The American University 1985-1987

HONORS AND AWARDS

Teacher of the Year, College of Arts and Sciences, 1975-76

Scholar of the Year, College of Arts and Sciences, 1978-79

Scholar of the Year, The American University, 1982-83

College of Arts & Sciences Nominee, American University Scholar/Teacher of the Year 1984-85, 1989-1990

Sherman Fairchild Distinguished Visiting Scholar, California Institute of Technology, 1980-81

American University summer research grant, 1978 & 1982

Chamber of Commerce, Outstanding Young Men of America 1979-80

Graduate Student Council, The American University, Faculty Award, 1982

Top Speaker Award, National Convention of the International Platform Association, 1983, 1984, 1987

National Age Group Champion (30-34) 3000 meter steeplechase 1979

Eastern Region Age Group Champion (30-34) 1500 meter run 1979

Defeated twenty opponents on nationally syndicated quiz show, TIC TAC DOUGH, 1981

SCHOLARSHIP

A. Books

PREJUDICE AND THE OLD POLITICS: THE PRESIDENTIAL ELECTION OF 1928 (Chapel Hill: University of North Carolina Press, 1979)

HISTORIANS AND THE LIVING PAST: THE THEORY AND PRACTICE OF HISTORICAL STUDY (Arlington Heights, Ill.: Harlan Davidson, Inc., 1978; with Valerie French)

ECOLOGICAL INFERENCE (with Laura Irwin Langbein, Sage Series in Quantiative Applications in the Social Sciences, 1978)

YOUR FAMILY HISTORY: HOW TO USE ORAL HISTORY, PERSONAL FAMILY ARCHIVES, AND

PUBLIC DOCUMENTS TO DISCOVER YOUR HERITAGE (New York: Random House, 1978)

KIN AND COMMUNITIES: FAMILIES IN AMERICA (edited, with Joan Challinor, Washington, D. C.: Smithsonian Press, 1979)

THE THIRTEEN KEYS TO THE PRESIDENCY (Lanham: Madison Books, 1990, with Ken DeCell)

POLITICS, POLICY, AND SOCIETY: A NEW HISTORY OF AMERICAN POLITICAL LIFE, in progress, contract signed with Indiana University Press.

B. Scholarly Articles

"The Federal Assault Against Voting Discrimination in the Deep South, 1957-1967," JOURNAL OF NEGRO HISTORY (Oct. 1969)

"Executive Enforcement of Voting Rights, 1957-60," in Terrence Goggin and John Seidel, eds., POLITICS AMERICAN STYLE (1971)

"Correlation, Regression, and the Ecological Fallacy: A Critique," JOURNAL OF INTERDISCIPLINARY HISTORY (Winter 1974)

"Critical Election Theory and the Reality of American Presidential Politics, 1916-1940," AMERICAN HISTORICAL REVIEW (April 1976)

"Across the Great Divide: Inferring Individual Behavior From Aggregate Data," POLITICAL METHODOLOGY (with Laura Irwin, Fall 1976)

"Regression vs. Homogeneous Units: A Specification Analysis," SOCIAL SCIENCE HISTORY (Winter 1978)

"Language Games, Social Science, and Public Policy: The Case of the Family," in Harold Wallach, ed., APPROACHES TO CHILD AND FAMILY POLICY

(Washington, D. C.: American Association for the Advancement of Science, 1981)

"Pattern Recognition Applied to Presidential Elections in the United States, 1860-1980: The Role of Integral Social, Economic, and Political Traits," PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE (with V. I. Keilis-Borok, November 1981)

"The End of Realignment Theory? Toward a New Research Program for American Political History," HISTORICAL METHODS (Fall 1982)

"Kinship and Family in American History," in National Council for Social Studies Bulletin, UNITED STATES HISTORY IN THE 1980s (1982)

"Modeling the Past: The Specification of Functional Form," JOURNAL OF INTERDISCIPLINARY HISTORY (with Ivy Broder, Winter 1983)

"Political Realignment and 'Ethnocultural' Voting in Late Nineteenth Century America, JOURNAL OF SOCIAL HISTORY (March 1983)

"The 'New Political History': Some Statistical Questions Answered," SOCIAL SCIENCE HISTORY (with J. Morgan Kousser, August 1983)

"Personal Family History: A Bridge to the Past," PROLOGUE (Spring, 1984)

"Geography as Destiny," REVIEWS IN AMERICAN HISTORY (Sept. 1985)

"Civil Rights Law: High Court Decision on Voting Act Helps to Remove Minority Barriers," NATIONAL LAW JOURNAL (with Gerald Hebert, November 10, 1986)

"Tommy The Cork: The Secret World of Washington's First Modern Lobbyist," WASHINGTON MONTHLY (February, 1987).

"Discriminatory Election Systems and the Political Cohesion Doctrine," NATIONAL LAW JOURNAL (with Gerald Hebert, Oct. 5, 1987)

"Aggregate-Level Analysis of American Midterm Senatorial Election Results, 1974-1986," PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (Dec. 1989, with Volodia Keilis-Borok)

"Black/White Voter Registration Disparities in Mississippi Legal and Methodological Issues in Challenging Bureau of Census Data," JOURNAL OF LAW AND POLITICS (Spring, 1991, with Samuel Issacharoff)

"Adjusting Census Data for Reapportionment: The Independent Role of the States," NATIONAL BLACK LAW JOURNAL (forthcoming, 1991, with Samuel Issacharoff)

"Passing the Test: Ecological Regression in the Los Angeles County Case and Beyond," EVALUATION REVIEW (December, 1991)

Understanding and Prediction of Large Unstable Systems in the Absence of Basic Equations," PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON CONCEPTUAL TOOLS FOR UNDERSTANDING NATURE (with V. I. Keilis-Borok, Trieste, Italy, 1991).

"The Self-Organization of American Society in Presidential and Senatorial Elections," in Yu. Krautsov, ed., THE LIMITS OF PREDICTABILITY (with V. I. Keilis-Borok, Nauka, Moscow, 1992).

"The Alternative-Justification Affirmative: A New Case Form," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Charles Garvin and Jerome Corsi, Fall 1973)

"The Alternative-Justification Case Revisited: A Critique of Goodnight, Balthrop and Parsons, 'The Substance of Inherency,'" JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Jerome Corsi, Spring 1975)

"A General Theory of the Counterplan," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Fall 1975)

"The Logic of Policy Dispute," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Spring 1980)

"Policy Dispute and Paradigm Evaluation," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (with Daniel Rohrer, Fall 1982)

"New Paradigms For Academic Debate," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (Fall, 1985)

"Competing Models of the Debate Process," JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION (Winter 1986)

"The Role of the Criteria Case in the Conceptual Framework of Academic Debate," in Donald Terry, ed., MODERN DEBATE CASE TECHNIQUES (with Daniel Rohrer, 1970)

"Decision Rules for Policy Debate," and "Debate as a Comparison of Policy Systems," in Robert Branham, ed., THE NEW DEBATE: READINGS IN CONTEMPORARY DEBATE THEORY (with Daniel Rohrer, 1975)

"A Systems Approach to Presumption and Burden of Proof;" "The Role of Empirical Evidence in Debate;" and "A General Theory of the Counterplan," in David Thomas, ed., ADVANCED DEBATE: READINGS IN THEORY, PRACTICE, AND TEACHING (with Daniel Rohrer, 1975)

"Decision Rules in Policy Debate;" "The Debate Resolution;" "Affirmative Case Approaches;" "A General Theory of the Counterplan;" "The Role of Empirical Evidence in

Debate;" and "Policy Systems Analysis in Debate," in David Thomas, ed., ADVANCED DEBATE (revised edition, with Daniel Rohrer and Jerome Corsi, 1979)

C. Popular Articles

"Presidency By The Book," POLITICS TODAY (Nov. 1979) Reprinted: LOS ANGELES TIMES

"The Grand Old Ploys," NEW YORK TIMES Op Ed (July 18, 1980)

"The New Prohibitionism," THE CHRISTIAN CENTURY (Oct. 29, 1980)

"Which Party Really Wants to 'Get Government Off Our Backs'?" CHRISTIAN SCIENCE MONITOR Opinion Page (Dec. 2, 1980)

"Do Americans Really Want 'Coolidge Prosperity' Again?" CHRISTIAN SCIENCE MONITOR Opinion Page (August 19, 1981)

"Chipping Away at Civil Rights," CHRISTIAN SCIENCE MONITOR Opinion Page (Feb. 17, 1982)

"How to Bet in 1984. A Presidential Election Guide," WASHINGTONIAN MAGAZINE (April 1982) Reprinted: THE CHICAGO TRIBUNE

"The Mirage of Efficiency," CHRISTIAN SCIENCE MONITOR Opinion Page (October 6, 1982)

"For RIFs, It Should Be RIP," LOS ANGELES TIMES Opinion Page (January 25, 1983)

"The Patronage Monster, Con't." WASHINGTON POST Free For All Page (March 16, 1983)

"A Strong Rights Unit," NEW YORK TIMES Op Ed Page (June 19, 1983)

"Abusing the Public Till," LOS ANGELES TIMES Opinion Page (July 26, 1983)

The First Gender Gap," CHRISTIAN SCIENCE MONITOR Opinion Page (August 16, 1983)

"Is Reagan A Sure Thing?" FT. LAUDERDALE NEWS Outlook Section (Feb. 5, 1984)

"The Keys to the American Presidency: Predicting the Next Election," TALENT (Summer 1984)

"GOP: Winning the Political Battle for '88," CHRISTIAN SCIENCE MONITOR, Opinion Page (Dec. 27, 1984)

"The Return of 'Benign Neglect'," WASHINGTON POST, Free For All, (May 25, 1985)

"Selma Revisited: A Quiet Revolution," CHRISTIAN SCIENCE MONITOR, Opinion Page, (April 1, 1986)

"Democrats Take Over the Senate" THE WASHINGTONIAN (November 1986; article by Ken DeCell on Lichtman's advance predictions that the Democrats would recapture the Senate in 1986)

"Welcome War?" THE BALTIMORE EVENING SUN, Opinion Page, (July 15, 1987)

"How to Bet in 1988," WASHINGTONIAN (May 1988)

Bi-weekly column, *The Montgomery Journal* 1990—present

The "Thirteen Keys to the Presidency," a system for predicting presidential election results developed by Allan J. Lichtman and Volodia Keilis-Borok has been the subject of dozens of articles published throughout the world. Highlights include three columns by nationally syndicated columnist David Broder, stories by the Associated Press and United Press International, the NEW YORK TIMES, WALL STREET JOURNAL, USA TODAY, CHRONICLE OF HIGHER EDUCATION, WASHINGTON POST, and a Reuters article published in such languages as German, Arabic, Chinese, Japanese, and Spanish.

Lichtman has lectured on the thirteen keys throughout the country and has appeared on Cable News Network, CBS News Nightwatch telecast, Biznet, the C-Span television news network, the Voice of America, and RKO, ABC, and NBC radio networks. In the April 1982 WASHINGTONIAN Lichtman presented what turned out to be a correct forecast of results for the presidential election of 1984. Subsequently, Lichtman developed the "Keys to the Senate" for predicting Senate election results without polls. Lichtman correctly called 30 of 34 1986 Senate races in predictions submitted to the WASHINGTONIAN in September and published a week before the election in the magazine's November issue. See "A Senate Seer," NEW YORK TIMES (November 6, 1986), p. A-28; "Election Forecaster's Crystal Ball Was Right," ATLANTA JOURNAL-CONSTITUTION (November 8, 1986); "Best Prediction," HOUSTON POST, November 15, 1986; "Bull's Eye for Keeper of Keys: Nearly Perfect Score on Senate Races," WASHINGTONIAN (December, 1986). In May of 1988, when George Bush was trailing Michael Dukakis by double-digits in the polls, Lichtman and Ken DeCell published a WASHINGTONIAN article predicting a Bush win in the Fall. The prediction was covered by the NEW YORK TIMES, WASHINGTON POST, CHRONICLE OF HIGHER EDUCATION, and USA TODAY, among other publications.

D. Reviews

Robert W. Fogel and Stanley Engerman, TIME ON THE CROSS: THE ECONOMICS OF SLAVERY, THE NEW REPUBLIC (July 6, 1974)

Burl Noggle, INTO THE TWENTIES, AMERICAN HISTORICAL REVIEW (1976)

Jerome Clubb, William Flanigan, and Nancy Zingale: PARTISAN REALIGNMENT, AMERICAN HISTORICAL REVIEW (1982)

Paul M. Kleppner, WHO VOTED?, JOURNAL OF AMERICAN HISTORY (1983)

Stanley Kelley, INTERPRETING ELECTIONS, JOURNAL OF AMERICAN HISTORY (1984)

Paula Eldot, AL SMITH AS GOVERNOR OF NEW YORK, AMERICAN HISTORICAL REVIEW (1984)

Paul Kleppner, THE THIRD ELECTORAL SYSTEM, JOURNAL OF AMERICAN HISTORY (1988)

Arno Mayer, WHY THE HEAVENS DID NOT DARKEN, WASHINGTON POST (1989)

E. Courses Taught:

Ongoing Courses

The History of the U. S. I & II, The Emergence of Modern America, The U. S. in the Twentieth Century, United States Economic History, Historiography, Major Seminar in History, Graduate Research Seminar, Colloquium in U. S. History Since 1865, The American Dream, The Urban-Technological Era, Senior Seminar in American Studies, Seminar in Human Communication.

New Courses: Taught for the first time at The American University

Quantification in History, Women in Twentieth Century American Politics, Women in Twentieth Century America, Historians and the Living Past (a course designed to introduce students to the excitement and relevance of historical study), How to Think: Critical Analyses in the Social Sciences, Pivotal Years of American Politics, Government and the Citizen (Honors Program), Introduction to Historical Quantification, Public Policy in U. S. History.

TELEVISION APPEARANCES

In 1981 I appeard as a contestant on seventeen consecutive shows of the nationally syndicated quiz program TIC TAC DOUGH. I defeated twenty opponents and accumu-

lated $104,455 in cash and prizes until felled by a question on nursery rhymes. As far as I know I was the top money winner on this show for 1981.

In 1976 I appeared on the afternoon talk show PANORAMA, broadcast in Washington, D.C. In conjunction with my role as co-Director of the Smithsonian Institution —American University Family History Project, I discussed how people can become the historians of their own families.

In August, 1983 my one-half hour talk "Thirteen Keys to the Presidency: How to Predict the Next Election" was aired nationally by C-Span, the Cable Satellite Public Affairs Network. The talk is based on a new system for predicting presidential election results (See WASHINGTONIAN MAGAZINE April 1982) and was originally presented at the 1983 Conventoin of the International Platform Association.

Commentator for Cable News Network on the march on Washington, August 23, 1984 and on the presidential election, July 16, 1984.

Half hour interviews on CBS News Nightwatch, on predicting the results of the 1984 election and on predicting the results of the 1988 election.

Half hour broadcast on C-Span, talk on election prediction presented to the American Association of Political Consultants, December 1986.

Half hour election-eve broadcast on C-Span, 1988

Half hour panel discussion (one of three panelists) on the Reagan Administration in historical perspective, CBS News Nightwatch, January 11, 1987.

More than a dozen Television programs for the United States Information Agency, Worldnet Network.

Several interviews on news shows such as CNN, Today Show, and ABC Nightly News.

RADIO SHOWS

I have participated in more than 200 radio interview and talk shows broadcast nationwide and in cities such as Washington, D.C., New York, Atlanta, Chicago, Los Angeles and Detroit.

ADMINISTRATIVE EXPERIENCE

Director of Forensics, Brandeis University, 1968-71

Director of Forensics, Harvard University, 1971-72

Chairman, New York-New England Debate Committee, 1970-71

Founding Director, The American University Honors Program, 1977-79

Chairman, College of Arts and Sciences Budget Committee 1977-78, 1982-84

Chairman, College of Arts and Sciences Faculty Colloquim, 1983

Chairman, College of Arts and Sciences Task Force on the Department of Performing Arts, 1984-85

Local Arrangements Chairman, National Convention of the Social Science History Association, 1983

Chairman, Rank & Tenure Committee of the Department of History, 1981-82, 1984-85

Senior Consultant to the National Forensics Institute, 1985

Board Member, Center for Congressional and Presidential Studies,1988-

Board Member, American University Press, 1991-

CONFERENCES AND LECTURES

Invited participant and speaker, Bostick Conference on Fogel and Engerman's TIME ON THE CROSS, University of South Carolina, Nov. 1-2, 1974

"Critical Election Theory and the Presidential Election of 1928," Annual Meeting of the American Historical Association, Dec. 1974

"A Psychological Model of American Nativism," Bloomsberg State Historical Conference, April 1975

"Methodology for Aggregating Data in Education Research," National Institute of Education, Symposium on Methodology, July 1975 (with Laura Irwin)

Featured Speaker, The Joint Washington State Bicentennial Conference on Family History, Oct. 1975

Featured Speaker, The Santa Barbara Conference on Family History, May 1976

Chairman, The Smithsonian Institution and the American University Conference on Techniques for Studying Historical and Contemporary Families, June 1976

Panel Chairman, Sixth International Smithsonian Symposium on Kin and Communities in America, June 1977

"The uses of History for Policy Analysis," invited lecture, Federal Interagency Panel on Early Childhood Research, Oct. 1977

Invited participant, Conference on "Child Development within the Family—Evolving New Research Approaches," Interagency Panel of the Federal Government for Research and Development on Adolescence, June 1978

Commentator on papers in argumentation, Annual Meeting of the Speech Communication Association, Nov. 1978

Commentator on papers on family policy, Annual Meeting of the American Association for the Advancement of Science, Jan. 1979

"Phenomenology, History, and Social Science," Graduate Colloquium of the Department of Philosophy," The American University, March 1979

"Comparing Tests for Aggregation Bias: Party Realignment of the 1930's" Annual Meeting of the Midwest Political Science Association March 1979, with Laura Irwin Langbein

"Party Loyalty and Progressive Politics: Quantitative Analysis of the Vote for President in 1912," Annual Meeting of the Organization of American Historians, April 1979, with Jack Lord II

"Policy Systems Debate: A Reaffirmation," Annual Meeting of the Speech Communication Association, Nov. 1979

"Personal Family History: Toward a Unified Approach," Invited Paper, World Conference on Records, Salt Lake City, Aug. 1980

"Crisis at the Archives: The Acquisition, Preservation, and Dissemination of Public Documents," Annual Meeting of the Speech Communication Association, Nov. 1980

"Recruitment, Conversion, and Political Realignment in America: 1888-1940," Social Science Seminar, California Institute of Technology, April 1980

"Toward a Situational Logic of American Presidential Elections," Annual Meeting of the Speech Communication Association, Nov. 1981

"Political Realignment in American History," Annual Meeting of the Social Science History Association, Oct., 1981

"Critical Elections in Historical Perspective: the 1890s and the 1930s," Annual Meeting of the Social Science History Association, Nov., 1982

Commentator for Papers on the use of Census data for historical research, Annual Meeting of the Organization of American Historians, April 1983

"Thirteen Keys to the Presidency: How to Predict the Next Election," Featured Presentation, Annual Confer-

ence of the International Platform Association, August 1983, Received a Top Speaker Award

"Paradigms for Academic Debate," Annual Meeting of the Speech Communication Association, Nov. 1983

Local Arrangements Chairman, Annual Convention of the Social Science History Association (Oct., 1983)

"Forecasting the Next Election," Featured Speaker, Annual Convention of the American Feed Manufacturers Association (May 1984)

Featured Speaker, "The Ferraro Nomination," Annual Convention of The International Platform Association, August 1984, Top Speaker Award

"Forecasting the 1984 Election," Annual Convention of the Social Science History Association Oct., 1984.

Featured Speaker, "The Keys to the Presidency," Meeting of Women in Government Relations Oct., 1984.

Featured Speaker, "The Presidential Election of 1988," Convention of the American Association of Political Consultants, December, 1986.

Featured Speaker, "The Presidential Election of 1988," Convention of the Senior Executive Service of the United States, July, 1987.

Commentary on Papers on Voting Rights, Annual Meeting of the American Political Science Association, September, 1987.

Commentary on Papers on Ecological Inference, Annual Meeting of the Social Science History Association, November, 1987.

Featured Speaker: "Expert Witnesses in Federal Voting Rights Cases," National Conference on Voting Rights, November 1987.

Featured Speaker: "The Quantitative Analysis of Elective Data," NAACP National Conference on Voting Rights and School Desegregation, July 1988.

Panel Chairman, "Quantitative Analysis of the New Deal Realignment," Annual Meeting of the Social Science History Association, Nov. 1989.

Keynote Speaker, Convocation of Lake Forest College, Nov. 1989.

Featured Speaker, The American University-Smithsonian Institution Conference on the Voting Rights Act, April, 1990.

Panel Speaker, Voting Rights Conference of the Lawyer's Committee for Civil Rights Under Law, April, 1990.

Panel Speaker, Voting Rights Conference of the NAACP, July, 1990.

Panel Speaker, Voting Rights Conference of Stetson University, April, 1991.

Panel Chairman, Annual Meeting of the Organization of American Historians, April, 1992.

DEPARTMENTAL AND UNIVERSITY SERVICE

Department of History Council 1973-

Undergraduate Committee, Department of History 1973-77

Chairman Undergraduate Committee, Department of History 1984-85

Graduate Committee, Department of History, 1978-84

Freshman Advisor, 1973-1979

First Year Module in Human Communications, 1977-79

University Committee on Fellowships and Awards 1976-78

University Senate 1978-79, 1984-85

University Senate Parliamentarian and Executive Board 1978-79

University Grievance Committee, 1984-85

Member, University Honors Committee, 1981-82

College of Arts and Sciences Budget Committee 1976-78; 1982-84

College of Arts and Sciences Curriculum Committee 1981-82

Jewish Studies Advisory Board, 1982-1984

Mellon Grant Executive Board, College of Arts & Sciences, 1982-83

Board Member, Center for Congressional and Presidential Studies, The American University, 1988-

Graduate Committee Chairman, Department of History, 1989-

Chairman, Distinguished Professor Search Committee 1991

Member, College of Arts & Sciences Associate Dean Search Committee.

OTHER POSITIONS

Historical consultant to the Kin and Communities Program of the Smithsonian Institution 1974-1979

Along with general advisory duties, this position has involved the following activities:

1. directing a national conference on techniques for studying historical and contemporary families held at the Smithsonian in June 1976

2. chairing a public session at the Smithsonian on how to do the history of one's own family

3. helping to direct the Sixth International Smithsonian Symposium on Kin and Communities in America (June 1977)

4. editing the volume of essays and workshops taken from the symposium

Consultant to the John Anderson independent campaign for president, 1980.

I researched and wrote a study on "Restrictive Ballot Laws and Third-Force Presidential Candidates." This document was a major component of Anderson's legal arguments against restrictive ballot laws that ultimately prevailed in the Supreme Court (Anderson v. Celebrezze 1983). According to Anderson's attorney: "the basis for the majority's decision echoes the themes you incorporated in your original historical piece we filed in the District Court."

Statistical Consultant to the George Washington University Program of Policy Studies in Science and Technology, 1983.

I advised researchers at the Policy Studies Program on the application of pattern recognition techniques to their work on the recovery of communities from the effects of such natural disasters as earthquakes and floods.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voting Behavior for the Lawyers' Committee for Civil Rights Under Law 1983-

I have analyzed racial bloc voting, turnout, and registration; socio-economic conditions; political systems; and methodological issues for voting rights cases involving the following jurisdictions: Petersburg, Virginia; Boston Massachusetts; Hinds County Mississippi; the state of Mississippi (voter registration); the state of Missisippi (judicial elections); Springfield, Illinois; Pittsburgh, Pennsylvania; Anchorage, Alaska; Crittenden County, Arkansas;

Red Clay School District, Delaware; the state of Florida (judicial elections). I have also analyzed statistical information on promotion practices for probation officers within the Philadelphia Court of Common Pleas. I prepared written reports for each of the three of the Mississippi cases, the Pittsburgh case, the Red Clay School District case, the Philadelphia case, and the Florida judges case. I presented in-court testimony for the judicial and registration cases in Mississippi, two judicial cases in Florida, and for the cases involving Springfield, Illinois; Crittenden County, Arkansas; and Red Clay School District.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for the United States Department of Justice 1983-

I have analyzed racial bloc voting; turnout and registration; socio-economic conditions; political systems; methodological issues for voting rights cases in the following jurisdictions: Greenwood, Mississippi; Halifax County, North Carolina; Valdosta, Georgia; Bessemer, Alabama; Marengo County, Alabama; Dallas County, Alabama; Cambridge, Maryland; Darlington County, South Carolina; the state of North Carolina (judicial elections); Augusta, Georgia; Wicomica County, Maryland; the state of Mississippi; Los Angeles, California, and the state of Georgia (judicial elections, majority vote requirement). I prepared written reports for the cases in Greenwood, Halifax County, Marengo County, Dallas County, Cambridge, Wicomico County, Los Angeles County, and Georgia. I presented in-court testimony for the cases in Dallas, Marengo, Wicomico, and Los Angeles Counties.

Expert Witness on Quantitative Analysis, Political Systems, Demography, and Voter Behavior for State, Municipal and County Jurisdictions, 1986-

I have analyzed matters such as racial and party bloc voting, turnout and registration, annexations, racial demography, political systems, and methodological issues for various state, municipal and county jurisdictions: Claiborne County, Mississippi; Dade County, Florida; Grenada County, Mississippi; Spartansburg, South Carolina; Maywood School District, Illinois; Crete-Monee School District, Illinois; the state of North Carolina; the state of Virginia; the state of Maryland; the state of Texas; the state of Connecticut; the state of Pennsylvania; and Indianapolis, Indiana. I prepared written reports for Claiborne, Grenada, and Dade Counties, Crete-Monee School District, and the states of North Carolina and Virginia. I presented oral testimony on behalf of Claiborne County and the state of Texas.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for Private Attorneys: 1986-

I have analyzed matters racial bloc voting, turnout and registration, political systems, political history, annexations, and methodological issues for private attorneys in voting rights cases taking place in Boyle, Mississippi; Cleveland, Mississippi; Mississippi statewide (legislative plan); City of Starke and Hardee County, Florida; Peoria, Illinois; Chicago Heights Illinois; Jefferson County Alabama; Chickasaw, Monroe, Newton, Simpson, and Yalobusha Counties, Mississippi; Columbus County, North Carolina; Kent County, Michigan; Massachusetts statewide (legislative plan); and Michigan statewide (legislative and congressional plans). I have analyzed statistical results of employment decisions by employers for an employment discrimination case, analyzed the history of peremptory strikes of black and white jurors in Hinds County for a death penalty case, and ballot access by third parties in Jefferson County, Alabama. I prepared written reports for all cases except Peoria and Jefferson County and have presented oral testimony in the jury selection case the Starke County case, the Hardee County case; the Jefferson County case; the Monroe County case;

the Chickasaw County case; the Columbus County case; and the statewide Michigan cases.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for the ACLU. 1987-

I have analyzed racially polarized voting, the socio-economic standing of racial groups, and black political opportunities for Henrico and Brunswick Counties, Virginia; and Southern Pines and Moore County, North Carolina. I prepared a written report for the Henrico case and the Southern Pines case. I presented in-court testimony for Henrico, Brunswick, and Southern Pines cases.

Expert Witness on Quantitative Analysis, Political Systems, Political History, and Voter Behavior for the Southern Poverty Law Center. 1990-

I have analyzed racially polarized voting, the socio-economic standing of racial groups, and black political opportunities for judicial circuits in the state of Alabama. I have prepared a written report and presented oral testimony in this case.

Expert Witness on the U. S. Census undercount for the Mexican-American Legal Defense Fund, 1991-

I have analyzed the impact of the Census undercount on the state legislative plan in Texas. I presented oral testimony in state court.

Historical Consultant to Senator George McGovern for the production of his memoirs 1976-78

This project involved research in oral and documentary sources relating to Senator McGovern's activities from 1968 to 1976. I wrote several hundred pages of background information for the Senator's use.

AFFIDAVIT OF THOMAS B. HOFELLER

CITY OF WASHINGTON)
) s.s.
DISTRICT OF COLUMBIA)

I am Thomas B. Hofeller, being duly sworn upon oath do state: I am currently employed as director of redistricting for the National Republican Congressional Committee (NRCC), located at 3200 First Street, S.E., Washington, D.C. 20003. In 1980, I received a Ph.D. in Government from the Claremont Graduate School, located in Claremont, California. I have offered testimony in numerous court cases involving redistricting in all areas of the country. Among those states are California, Mississippi, Illinois, Michigan, Arizona, Texas, and North Carolina. I have worked on cases for organizations affiliated with both the Republican and Democratic Parties, and for organizations who were both plaintiffs and defendants in Voting Rights actions.

In my capacity as a redistricting consultant, Redistricting Director of the Republican National Committee (1982-83), Director of Computer Services for the Republican National Committee (1982-83), and in my present employment, I have been in a unique position to evaluate redistricting plans for congressional districts from all over the United States. A copy of my resume is attached to this affidavit.

I have previously testified in this case regarding the congressional redistricting and as a result I have examined the prior testimony, exhibits and findings. I have also examined the population and political data produced by the State of Florida and Dr. Richard Scher's study comparing the submitted plans for the state legislature. I have utilized this information in my comparison of the plans. In my comparison, I have concentrated on the two primary federal criteria; one-person, one-vote, and com-

pliance with the Voting Rights Act. Less crucial but still important criteria in my analysis are communities of interest, compactness, contiguity, political fairness and avoidance of unnecessary jurisdictional splits.

As regards to the one-person, one-vote criteria, the plaintiffs' plan (275) has a deviation of plus one or minus 1 person. While a deviation this low is not a crucial factor by itself, It is extremely important when a plan is drawn in conjunction with other criteria, since it limits the number of available options to those seeking to draw lines to their political advantage. As discussed later, this plan apparently attempts to adhere to these criteria and therefore the low deviation guards against political gerrymandering in this plan, as well as guaranteeing that each elector's vote is numerically equal to every other.

I will first give a region by region discussion of the plan, followed by some general comments and a short conclusion.

REGION BY REGION ASSESSMENT OF PLAN 275

PANHANDLE

This portion of Florida contains sufficient population for two senate seats. Both districts are compact, although there are some jurisdictional splits. These were done in order to maintain related communities of interest within each district. For instance, Pensacola Beach, which is on an island, lacks direct road access with the rest of Escambia County. Moreover, Plan 275 does not fragment the black community in Pensacola.

NORTH FLORIDA

The North Florida portion of the Panhandle contains 27 mostly rural counties and has enough population for three Senate seats. In the Plaintiffs' plan, these districts are identified as Districts 2, 5, and 6. As I noted in my congressional testimony, the black communities in this

area share common interests and a history of discrimination that is one of the worst in the state. The black communities in North Florida have been fragmented in every redistricting scheme produced by the state.

Plan 275 ends this fragmentation by maximizing minority influence. The district has a total black population of 44.4%, a black VAP of 41.1% and a total black voting registration of 39%. More significantly, however, is that black voters account for 46% of the registered Democrat voters, and with either an effective voter registration or turnout program, black voters could control the Democrat primary.

Winning the Democrat primary in this part of Florida is tantamount to winning the election. The district is 83.9% registered Democrat and only 13% registered Republican. This part of Florida has never elected a Republican to Congress, State Senate, or State House.

Two black State House members who were elected from demographically similar districts reside in District 2.

District's 5 and 6 in the Plaintiffs' Plan contain the remaining counties in North Florida and protect county and municipal boundaries except in those areas where following such lines would have fragmented the minority community.

NORTHEAST FLORIDA

The area stretching from the St. John River from Nassau to Northern Volusia County, comprises enough population for 3 Senate seats. In Plaintiffs' Plan, these districts are identified as 7, 8, and 9.

In Plaintiffs' Plan (275), District 7 was drawn first for the specific purpose of maximizing minority influence. The district has a total black population of 51.9%, black VAP of 47.9%, and a total black voter registration of 50.3%. The district contains parts of Duval, Nassau, St. Johns, Clay, Putnam, Flagler and Volusia Counties.

Current District 7 (Duval and Nassau) has elected a black Senator since 1982 and has a black population of 48.4%, black VAP of 45.6%, and black voter registration of 50.8%. It should be noted that the current district is 85,815 people under the ideal district population. As a result, the district had to be extended to include minority communities in St. Johns, Putnam, and Volusia.

The ultimate shape of this district in Plan 275 was dictated by the need to reach an acceptable deviation and at the same time avoid unnecessary retrogression of minority voting strength. The plaintiffs' plan meets the one person, one vote criteria and has a total black population of 51.9% and a black VAP of 47.9%.

Districts 8 and 9 in Plaintiffs' Plan (275), contain the remaining portions of Duval, Nassau, St. Johns, Clay, and Flagler Counties and protect city boundaries in those areas not affected by the minority access district 7.

This plan maximizes the integrity of all the communities of interest in the Northeast Florida region.

TAMPA BAY AREA

This portion of Florida includes Pinellas, Hillsborough, Manatee, and Pasco Counties and contains enough population for just over six Senate seats. Plan 275 denominates these districts at 4, 18, 19, 20, 21, 22, and 23.

District 18 in Plan 275 was intended to link the related and cohesive minority communities of Pinellas, Hillsborough, and Manatee Counties. This district has a total black population of 41.9%, black VAP of 36.5%, and black voter registration of 37.1%. Additionally, the district has a hispanic population of 11% and a hispanic VAP of 11.1%. Traditionally, Tampa's hispanic community is predominantely Democrat and, as noted by the Department of Justice, is cohesive with black voters. This same geographic area is currently served in the State House by one hispanic and two black house members, all Democrats:

Dist.	Incumbent	Black% VAP	Black % Reg.	Hispanic % VAP
63	Hargrett (B)	50.4%	60%	13.0%
55	Jamerson (B)	49.4%	50.2%	2.0%
65	Martinez (H)	11.0%	12.2%	31.5%

The success of these candidates indicates that the Senate district in Plan 275 should also allow the minority community the opportunity to elect a candidate of its choice. District 18 in Plan 275 is 67.6% Democrat and only 26.2% Republican. This high Democrat registration should allow the minority community to control the Democrat primary and thereby elect candidates of the minority community's choice. This is similar to the factual situation in *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989).

Districts 19, 20, 21, and 22 are totally contained within the remaining portions of Pinellas, and Hillsborough Counties, and District 4 includes West Pasco, Hernando and parts of Citrus Counties. These districts appear to protect city and county boundaries in those areas which are not affected by the voting rights district, thereby promoting compactness, contiguity and protecting the communities of interest in these areas. For instance, there does not appear to be an unnecessary combination of urban, suburban, beach and rural communities in this region.

LOWER GOLD COAST

This portion of Florida, which stretches from Broward to Monroe County, contains enough population for just under ten Senate Seats. This three-county area contains approximately 590,000 black residents and Dade County alone contains just under 1 million hispanics. Although this region is politically complex, as the expert's plan for the congressional districts indicates, it is not difficult to draw a fair plan for all which meets the requirements of

one person, one vote and the Voting Rights Act. This plan mirrors the congressional plan used by this Court.

In the Plaintiffs' Plan (275), two black and four hispanic seats were created. These districts are identified as 32 and 36 (black majority), and 33, 34, 35, and 40 (hispanic majority). The remaining districts in this region are identified as 28, 29, 40, 31, and 39.

The following chart illustrates that the Plan 275 districts ensure the black and hispanic communities the ability to elect candidates of their choice while not submerging these diverse communities into each other's districts as has been done in the past.

Black Districts
Plan 275

Dist.	Pop.	% Black Pop.	% Black VAP	% Black V. Reg.
32	323,448	62.9	57.1	53.4
36	323,448	61.8	57.3	62.7

Hispanic Districts
Plan 275

Dist.	Pop.	% Hisp. Pop.	% Hisp. VAP
33	323,448	69.4	71.5
34	323,448	65.2	66.1
35	323,428	55.4	55.0
40	323,448	65.2	66.2

Plan 275 redrew Dade and Broward counties to create two strong black and four strong hispanic districts. Plan 275 recognized the serious degree of polarization between black and hispanic voters in Dade County and avoided placing competing minority interests in the same seat and met the one person, one vote criteria.

Districts 28, 29, 30, 31 and 39 in the Plaintiffs' plan contain the remaining population within the lower Gold Coast and comply with the standards of one person one vote, compactness, and protection of the integrity of municipal boundaries in those areas not affected by the six voting rights districts.

UPPER GOLD COAST

This portion of Florida includes St. Lucie, Martin, Palm Beach, and Northern Broward Counties and contains enough population to comprise four (4) Senate seats. Plan 275 identified these districts as 24, 26, 27, 28, and part of 37.

District 24 avoids the fragmentation of a cohesive minority community. The district has a total black population of 40.5%, black VAP of 35.2% and has a total black voter registration of 30.9%. The district also has an 11% hispanic population—primarily farm workers who traditionally vote Democratic. Historically, these Hispanics who are not of Cuban heritage and vote in a cohesive pattern with the black community with whom they share similar economic interests.

District 24 in Plan 275 connects the Palm Beach County black neighborhoods of Belle Glade, West Palm Beach, Riviera Beach, Boynton Beach and Delray Beach with the black communities in Fort Pierce, Indiantown, South Melbourne, and Okeechobee.

Because District 24 in Plan 275 is 62.9% Democrat and is only 29.8% Republican, the minority community should be able to elect candidates of its choice as discussed earlier in the section regarding the Tampa-St. Petersburg region. Without this district, this minority community would inevitably be thrown into districts which would be amalgamations of rural, beach and suburban areas.

Districts 26, 27, 28 and 37 comprise the remaining portions of Palm Beach, Martin, and St. Lucie Counties and to the extent possible protect city boundaries where the requirements of the Voting Rights Act and one person, one vote do not require otherwise, thereby protecting the non-minority communities of interest.

GENERAL COMMENTS

Dr. Scher's study supports two important points about Plan 275:

1. the plan maintains communities of interest; and,
2. the plan promotes political fairness.

Dr. Scher's study points out that relatively few people are moved to new districts in Plan 275 (paragraphs 66a, 66b, and 77). Alone, this statistic might indicate nothing more than a "status quo" plan but, we know that substantial change was executed by Plan 275 to correct for the population variances revealed by the 1990 census and to eliminate the past fragmentation of the minority community. In order to attain the high correlation of population to prior districts and create a low deviation and a plan that scrupulously protected the minority communities, the architects of Plan 275 had to be making great efforts to avoid dividing existing communities and jurisdictions.

Dr. Scher's analysis of the correlation of Democrats and Republicans who were not moved from their current districts indicates that the drafters of Plan 275 did not attempt to "scramble the egg" or mix up voters in an effort to destroy the apparent incumbents by pairing or forcing them to run in new districts. This point is bolstered further by Dr. Scher's conclusion that 25 of the 40 Senate districts, or 62.5%, are competitive by party. This indicates that the authors of Plan 275 did not have as their goal a partisan gerrymander or the blind protection of incumbents.

RESPONSE TO THE COURT

The Court's order of June 18, 1992, required the parties to submit their proposed expert witness testimony and also directed the parties to respond to seventeen (17) specific questions. I have read the responses to each of the questions which are attached to this affidavit and marked as Exhibit I, and I adopt each as my full and accurate response.

CONCLUSION

In my professional opinion, Plan 275 meets the criteria required of court drawn plans, scrupulous adherence to the one-person, one-vote principle and the protection of minority voting rights. The plan also avoids unnecessary retrogression of existing minority districts and ends the submergence of many minority communities in bloc voting, white anglo districts. In addition, the plan appears to show high regard for the secondary criteria of community of interests, contiguity, compactness, avoidance of jurisdictional splits and political fairness. If the court were to adopt this plan it could be confident that it would be fair as well as meeting all the legal criteria.

/s/ Thomas B. Hofeller
THOMAS B. HOFELLER

(Notarization Omitted in Printing)

AFFIDAVIT OF DARIO V. MORENO

(Plaintiffs' U.S. Exhibit # 45)

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

I, Dario V. Moreno, the undersigned, being first duly sworn upon oath, do hereby depose and state as follows:

PURPOSE OF AFFIDAVIT

The purpose of this affidavit is to comply with the Court's order of June 18, 1992, which requires the parties to submit their proposed expert witness testimony. The order also directs the parties to respond to seventeen (17) specific questions. I have read the responses to each of the questions which are attached to this affidavit and marked as Exhibit I and entitled Response to the Federal Court's Questions. *To the extent that the responses in Exhibit A pertain to Dade County*, they are full and accurate responses.

AFFIANT'S QUALIFICATIONS

1. I am a professor in the Department of Political Science at Florida International University. I received my Ph.D. from the University of Southern California in 1987. I have done extensive research in the area of ethnic politics in Dade County, Florida. I have published the following book chapters that deal with ethnic and racial politics in Dade County and Metropolitan Miami:

a) "Ethnicity & Partisanship: The Case of the 18TH Congressional District in Miami," (Co-authored with Nicol Rae) in Guillermo Gerner *Miami Today* (Miami: Florida International University Press).

b) "The Conservative Enclave: Cubans in Florida, (Co-authored wjth Christopher Warren), in Rudolfo de la Garza, *Latinos in the 1988 Elections*, (Boulder: Westview Press).

I am currently Working on the following projects dealing with ethnic and racial politics in Dade County:

a) "Florida Hispanics in the 1992 Election, (Co-authored with Christopher Warren), in Rudolfo de la Garza, *Latinos in the 1992 Elections*.

b) "Redistricting in Florida: Tripartite Politics in Florida (Co-authored with Nicol Rae), in Fernando Guerra and Luis Fraga, *Latinos and Reapportionment*.

I have authored the following conference papers and presentations relating to ethnic and racial politics in Dade County, Florida:

a) "The Political Empowerment of Cuban Americans," speech before the Latino/Latina Leadership Opportunity Program, University of California at Los Angeles.

b) Cuban-American Political Empowerment," Inter-University Program for Latino Research National Conference: Latino Research Perspectives in the 1990's, Pomona, California.

c) "Recruitment of Latinos in Graduate School," Annual Meeting of American Political Science Association, Atlanta, Georgia.

I have also appeared as an expert political commentator on various local and national television programs dealing with Hispanic voting behavior in Dade County. I was also named by the President of the American Political Science Association to the Committee on the Status of Latinos.

2. I am familiar with the pattern of ethnic voting in Dade County through the research required by the above

listed book chapters, conference papers, and presentations. In addition, I have reviewed the various districting plans submitted by plaintiffs, defendants, and others, for Congress, State Senate, and State House. From that research and review, I have determined certain facts and certain opinions, which are listed below.

I. Introduction

3. Dade County is profoundly divided by the competing interests of three distinct and separate ethnic groups. The Black, Hispanic, and non-Hispanic White communities all have different social and economic interests. The division of Dade along ethnic lines has made Miami the contemporary symbol of racial upheaval in America. The deep ethnic tensions in Dade are illustrated by the fact that four times in the 1980's the county was rocked by race riots. The cleavages between the "community of interests" of the three major ethnic groups has led to the development of tripartite politics in Miami. "Tripartite politics" refers to the notion that ethnic factors between the three communities predominate over all other factors in Dade politics. The existence of competing "community of interests" between the different ethnic groups is demonstrated by the fact that Blacks, Hispanics, and non-Hispanic Whites each live in compact and contiguous neighborhoods, are politically cohesive, vote in blocs, and are politically polarized from each other.

4. The complex political geography and ethnic politics of Dade requires a redistricting plan that takes into account the interests of its different communities. The current districting arrangements as well as Senate Joint Resolution 2G do not fully recognize the interests of the Hispanic and Black communities in Dade.

II. Geographic Compactness and Cohesion

5. The three ethnic groups are not spread uniformly across the metropolitan area but instead reside in a mixed pattern of enclaves and neighborhoods. The gulf between

Dade's different ethnic groups and the effects of lingering segregation were clearly revealed in a recent poll which showed that 42 percent of the Anglos and 45 percent of the Hispanics live in neighborhoods that contain no Blacks. At the same time, 26 percent of the Anglos live in neighborhoods without Hispanics.

A. Hispanics

6. Dade county's Hispanic community is not only geographically compact but it is also politically cohesive. Based on the 1990 census, Hispanics make up only 12.16 percent of the state's total population, (1,574,143 out of 12,937,926) a rather small proportion when compared to other Latino population centers in the United States. Greater Miami, however, ranks third in the nation, behind only Los Angeles and New York, in the size of its Hispanic population. When one considers that the Miami area has a substantially smaller overall population than either of these other two cities, and that almost all of the Hispanic population has settled in the city since 1960, it is of little surprise that the Metro-Dade Planning Department claims that Miami has undergone the single most dramatic ethnic transformation of any major American city in this century. According to the census, well over 60 percent of all Hispanics living in Florida reside in Dade County. The 1990 census shows that about 51.2 percent of the population of Dade county is Hispanic. (See Table 1 and Table 2)

7. The 1990 census figures illustrate the dramatic increase in the Latin population during the last ten years. It is estimated that during the 1980's over 300,000 Latin Americans moved into Dade County. At the threshold of the decade there was the Mariel boatlift which brought in 125,000 Cuban refugees, often poorer than Cubans who had come earlier. Around the same time 70,000 Nicaraguans who fled the Sandinista regime and civil war arrived. Colombians, Peruvians, Hondurans, Guatemalans, each escaping turmoil in their countries soon fol-

lowed, melding into Dade's flourishing Hispanic community and taking advantage of the political space created by Cuban-Americans during the 1980's. (See Table 3) The total Hispanic population of Dade County is 953,407 of which about 55 percent is Cuban-American.

8. The state's Hispanic population is not only concentrated in the Miami area, but within Dade County, distinctive neighborhood settlement patterns have also tended to concentrate the Hispanic population in well defined areas. Hispanics have basically settled in three sections of Dade. The traditional concentration of Hispanics is the Little Havana section of the City of Miami, where Cuban refugees first settled in the early 1960's. Sections of Little Havana range from about 70 to 90 percent Hispanic, and most of the 239,400 Cubans in the City of Miami live in this section of town. The most rapid Hispanic growth (Cubans, Nicaraguans, and South Americans) in the county is taking place in the West Dade area, made up of the communities of Sweetwater, Village Green, Westchester, and West Kendall, where Hispanics make up over 70 percent of the population. The third area of Hispanic, mostly Cuban, concentration is the Northwest section of the county which consist of the cities of Hialeah, Miami Springs, and their surrounding neighborhoods. These areas range from 55 to 85 percent Hispanic. In addition there is a sizeable Hispanic, mostly Mexican, farm-worker's community in the Homestead area.

9. The largest number of Hispanics in Dade County are Cubans. The Cuban community in Dade traces its modern roots to Fidel Castro's revolutionary victory on January 1, 1959. During the ensuing 30 years, more than 750,000 Cuban refugees arrived in the United States, most passing through Miami. By 1985, the Census put the number of Cuban's living in the U.S. at 1,036,000. Most Cuban-American settled in Miami or returned to the city after first settling in the North, and thus over half of the nation's Cuban-Americans lives in Dade county.

The formation of a Cuban enclave in Miami has also proven to be an important factor in explaining the arrival of other Hispanic groups in Miami. The relative prosperity of the Cuban community and their large numbers in cohesive and contiguous neighborhoods have safeguarded other Hispanic groups from the language discrimination that has plagued other Latins in the United States. Dade County's Hispanic enclave became a community where Spanish-speaking immigrants could settle without fear of being at a serious disadvantage because of the language barrier. The 1990 census showed that Spanish has replaced English in Dade as the language most often spoken at home. Fifty percent of those surveyed in 1990 said they spoke Spanish at home, compared to 43 percent who spoke English.

10. The fear of language based discrimination has served to unite Dade's Hispanic communities. The fear of an anti-Spanish backlash has been reinforced by English only initiatives, at both the county and state level, which seemed to be specifically aimed at Miami's Latin population. In November 1980 Dade voters approved an ordinance prohibiting the use of any language other than English in county business. This ordinance overturned a Metro ordinance passed several years previously that had established Dade County as "officially bilingual." The petition drive and resultant referendum turned into a name calling contest between Hispanics and Non-Hispanic communities. A poll taken at the time of the referendum indicated that nearly half of those voting for the ordinance did so in order to express their "protest" and "frustration" with Dade's Latinos and not because they thought the ordinance was a good idea. The voting on the ordinance was extremely polarized: 71 percent of Non Hispanics who voted supported the ordinance, 85 percent of Latins opposed it. Similarly, in 1988 Florida voters overwhelmingly approved Proposition 11. This proposition was the "English as official language" amendment to the Florida state constitution. Hispanics were again the only group

that opposed the amendment in another extremely polarized election, voting over 80 percent against the measure. However, the measure was approved by Dade County voters by 61 percent and passed state-wide with over 80 percent of the vote. The vote on this proposition was strictly along ethnic lines in Dade as Blacks supported its passage by about 80 percent and Non-Hispanic White by over 80 percent. The easy passage of Proposition 11 reinforced the feeling in the Hispanic community that the Spanish enclave created by Cuban exiles was surrounded by hostile English speaking communities.

11. The Cuban-American community has taken the lead in defending the right of the Spanish-speaking minority (majority) in Dade county through the development of its own anti-discrimination institutions, and through quick reactions to discriminatory behavior. The Spanish American League Against Discrimination (SALAD) is particularly noteworthy for its work in this area. Spontaneous citizen action also plays a significant role. For example, in the aftermath of the passage of Proposition 11, a supermarket clerk was suspended for speaking Spanish in front of customers. The Hispanic community's reaction was swift and effective. The store in which the incident occurred received over twenty bomb threats, picket lines were set-up, and the powerful Spanish-speaking radio stations began organizing a boycott of the supermarket chain. Less than forty-eight hours after the incident, the company announced that the clerk would be reinstated, the offending manager transferred out of Dade County, and the store issued a public apology to their Spanish-speaking customers. Afterwards, the chain conducted an extensive campaign in the Spanish-speaking media to regain their share of the Hispanic market. Hispanic vigilance against language based discrimination was reinforced when news broke in April, 1992 that a personnel agency refused to refer people with foreign accents to job openings at a Miami bank.

12. The cohesiveness of Dade's Hispanic community has also been buttressed by the ideological affinity of its two largest groups (Nicaraguans and Cubans). Nicaraguan exiles, who fled the leftist Sandinista regime, shared the same fervent anti-communism as their Cuban neighbors. The Cuban and Nicaraguan exiles continue to work together for a conservative foreign policy agenda. Congresswoman Ileana Ros-Lehtinen presented Nicaraguan President Violeta Barrios de Chammorro, during her April 1992 state visit, with a list of properties seized by Marxist Sandinistas which has yet to be returned to their original owners.

B. Afro-Americans

13. Dade County's Afro-American community, while not as geographically compact and cohesive as the Hispanics, is also well within the Voting Rights Act standards as far as being geographically compact and politically cohesive. The 1990 census shows that Blacks comprised 16.57 percent (369,621) of the population of Dade county. Overall, there are about a dozen identifiable Black neighborhoods, from the densely populated housing developments in Liberty City (which is not a city at all, but a mostly unincorporated area, bordering the city of Miami in northwest Dade), to the sparsely settled Black neighborhoods in the southern agricultural sections of the county. The largest Black communities are found in the Northern area of the county, beginning in the Overtown neighborhood adjacent to Downtown Miami, going northwest through Liberty City, Opa Locka up to the Broward county line. In addition to these contiguous black neighborhoods in the Northern part of the county, there are substantial pockets of Black population in the Southern portion of the county in Coconut Grove, South Miami, Richmond Heights, Gould, and Florida City.

14. Black settlements patterns have had a profoundly negative effect on political mobilization. Historically, due

to both the legacy of Southern racism and the conscious placement of some Black settlements in the unincorporated areas of the county, Blacks play an almost insignificant role in local politics. Although the City of Miami has always had a substantial Black population, and while there has been some Black resettlement in other Dade municipalities, especially Opa Locka and Florida City, over 60 percent of Black Miamians live in unincorporated sections of the county. This settlement pattern, and the extent to which it undermines black influence in local government and complicates grass-roots organizing, stands as a formidable barrier to political mobilization. These factors, along with the at-large county and City of Miami elections, combine in compounding the obstacles faced by Blacks in shaping public policy in Dade.

15. Blacks are also the most disadvantaged of the three major ethnic groups that live in the Greater Miami area. In all social-economic indicators Afro-Americans are the worst off of Dade county's citizens. For example, according to estimates of Dade County Planning Department, only 1 percent of local businesses belong to Blacks. The average median family income for Blacks was $20,209 compared to $23,446 for Hispanics (Cubans, the most affluent of Latinos, averaged $26,770), while Whites enjoyed the highest at $35,977. Blacks are also more likely to feel the effects of discrimination. According to one poll 34 percent of Miami's Black community said that they or someone they know faced discrimination in seeking a job or promotion. (See Table 5) Education for Blacks is also far below the standard for Hispanics and Whites. According to Dade County Public Schools six out of the seven senior high schools that were designated as deficient last year because of low test scores were predominately Black (Carol City, Edison, Jackson, Norland, Northwestern, and Miami Central). Moreover, Black dropout rates were the highest at 8.9 percent, compared to 7.2 percent for Hispanic students and 5.5 percent for Whites.

16. Miami's Black community facing discrimination, poverty, and not participating in local decision-making has erupted in violence four times during the 1980's. The Black neighborhoods of Liberty City experienced, what was by some measures, the most violent riots of the century in May 1980 and Overtown experienced several nights of disorder in December 1982, in the Spring of 1984 and again in January 1989. The immediate reason for these riots was the police shooting of Black residents but these disturbances also reflect the frustration of the Black community with the small number of Black police officers, the violent acts of some police officers toward Black citizens, the absence of Black owned businesses—indeed, poverty, unemployment, ethnic tensions, and powerlessness in general.

17. In 1990 the Miami Black community used a more sophisticated tactic to express its grievance against the White and Hispanic elites with the Black boycott on Greater Miami. A boycott of the Miami tourism and hospitality industry was called by the Black community in 1990 to protest their marginalized status. The event which instigated this Black "empower" movement was the less-than-dignified treatment given the African National Congress (ANC) leader, Nelson Mandela, when he addressed a labor conference in South Florida in June, 1990. But the demands of the protestors, who call themselves Boycott Miami: Coalition for Progress, go beyond formal apology and redress; they attack the economic lifeline of Miami, the tourism industry in hopes of redressing the grievances of the African-American community.

18. Winnie and Nelson Mandela were not officially greeted nor honored by any elected body in Dade County, after Mandela recognized on the television show "Nightline" three long-time, loyal supporters of the ANC's anti-apartheid struggle: Cuban president Fidel Castro, Palestine Liberation Organization leader Yasser Arafat, and Libyan leader Colonel Moammer Gadhafi. The conven-

tional explanation of the snub that followed is that these three men had many enemies in Miami: anti-Castro/anti-communist immigrants, Pro-Israel Jews, "patriotic Americans" who hate Gadhafi, and many others who find few good words to say about these men.

19. The Koppel broadcast energized Miami's influential Hispanic radio personalities causing many of the area's political elite to seek maneuvers to placate angered constituents. Not wanting to appear individually nor regionally as racist, the same mayors who might have once welcomed Mandela suddenly felt pressure from constituents not to do so. Ultimately official welcomes prepared for presentation to Mandela were rescinded. In the case of the City of Miami, the welcome was replaced by a joint statement from five mayors (Miami, West Miami, Hialeah, Hialeah Gardens, and Miami Beach) in which Mandela was congratulated for his new found freedom and admonished for his support of human rights violations in Cuba.

20. The obvious pandering to the Cuban and Jewish communities at the expense of the black community further marginalized the latter. Angered and outraged at the politically motivated show of disrespect by the White and Hispanic political establishment for a Black international hero, Boycott Miami: Coalition for Progress was born. As a formal political coalition, the Black community directly confronted the local business elite with something more frightening than any riot, the gutting of the economic foundation of South Florida, its convention and tourism industry. "The boycott is the most potent economic empowerment weapon blacks have." According to Ty Stroh, Vice-President for sales of the Greater Miami Convention & Visitor Bureau (GMCVB) "lost convention revenue in 1992-1995 could be as much as $12 million . . . . It's not a large percentage but it is an important percentage."

C. Non-Hispanic Whites

21. The non-Hispanic White population is rapidly declining, falling from about 80 percent of the county total in 1960, to less than 33 percent in 1990. The two major municipalities in Dade that are still politically dominated by non-Hispanic Whites are Miami Beach and Coral Gables, but in both these cities the Hispanic population is growing fast. While several of the smaller municipalities have predominately non-Hispanic White population, the important bases of local Anglo power are the county government and the downtown business section. The downtown section serves as home to the Metro government offices and most of the large business, legal, civic, and media institutions that are involved in community affairs—most of which are primarily run by non-Hispanic Whites. The tension between these institutions and the growing Latin populations is reflected in the current feud * * * the President of the Cuban-American National Foundation * * * Canosa and the Publisher of the *Miami Herald* David * * * the Herald's editorial policy.

22. The non-Hispanic White population has also been able to retain considerable political power by maintaining control of Dade's delegation to both Washington and Tallahassee. Although, they represent less than a third of the county's population, non-Hispanic Whites comprised ten out of the twenty members of the Dade delegation to the state House, control three out of the seven state Senate seats, and three out of the four seats in the U.S. Congress. The over-representation of this community is a factor of favorable districting and their control over Dade's business and media establishment.

III. Voting Behavior

23. In determining the voting behavior of ethnic groups in Dade I used extreme case also called homogeneous case analysis. In this test the vote results of different precincts of racial and ethnic homogeneity are com-

pared. I used 85 percent for Blacks, 85 percent for non-Latin White, and 70 percent for Hispanic. The Hispanic is lower, because the Metro-Dade Election Department only counts as Hispanics those Latins born outside the United States or in Puerto Rico. Thus there is an under count of Hispanics in the registration rolls of Dade County. In my analysis of voter polarization I selected those races where the candidates of choice of Black, non-Hispanic White, or Hispanic voters could be compared. Also I compared the results over time to see if there was a pattern of homogenous precincts consistently voting in opposite ways. This is how I inferred that polarized voting has taken place.

24. The political cohesiveness of the Black and Hispanic communities is further underscored by their voting behavior. Both communities engaged in bloc voting.

A. Bloc Voting

25. The 1988 Presidential election saw Cuban-Americans in Florida vote overwhelmingly Republican. George Bush carried the Hispanic precincts of Dade County (Miami) with over 85 percent of the vote, while another conservative Republican, Connie Mack, carried those same precincts in Florida's U.S. Senate race with about 80 percent of the vote.

26. These 1988 eelction results underscore the pattern of strong Cuban loyalty to the GOP—a pattern which was more latent through the 1970's, but which was then dramatically reinforced in the 1980 presidential election when over 80 percent of the voters in the predominantly Cuban precincts voted for Ronald Reagan, and again in 1984 when they gave Reagan over 85 percent of the vote. Thus, the Cuban vote stands in stark contrast to that of other Latinos across the U.S. who have consistently supported the Democratic ticket by two-to-one margins. For instance, polls indicate that in 1988, Michael Dukakis received 70 percent of the Latin vote

nationwide, whereas in Miami's heavily Cuban precincts, Dukakis only received 15 percent of the vote—almost a five-to-one contrast between the votes of Cuban and those of other Latins across the country.

27. The Hispanic population of Dade County loyalty to the GOP is across the board and has had a profound influence on both local and state politics. In addition to the largely Hispanic precincts in Dade voting strongly Republican in the 1980, 1984, and 1988 presidential elections, a profile of recent state-wide elections shows a similar process of declining support for the Democratic party among Cubans. The 1982 Governor's race saw Bob Graham, a moderate incumbent from Mami, carry the Hispanic precincts of Dade County with about 60 percent of the vote against a weak Republican opponent. At the same time, another moderate Democrat, Lawton Chiles, was re-elected to the U.S. Senate, carrying a similar margin of the Latin vote. However, by 1986, the Cuban vote was firmly in the Republican column. Graham, who was now running for the U.S. Senate against a weak Republican incumbent, Paula Hawkins, received only about 24 percent of the vote in the Hispanic precincts of Dade, although he was able to carry the country with 56 percent of the vote. Then, in the 1986 Governor's race, Republican Bob Martinez carried the Hispanic precincts of Dade over his Democratic opponent, receiving 79 percent of the vote. Thus, the pattern of disproportionate Cuban support for the Republicans was firmly established by the time of Florida's 1988 Senate race to fill Lawton Chiles' seat. In that contest, as we noted above U.S. Representative Connie Mack carried the Hispanic precincts of Dade with over 80 percent of the vote in an otherwise extremely close race against Democratic House member Buddy McKay. Mack lost the county-wide vote, but the Latin bloc still proved to be a decisive factor in Mack's victory. The Hispanic support for Republican candidate was again demonstrated in the 1990 Governor race, when the Latin

precinct voted two-to-one to return Martinez to the Governor's mansion despite a powerful challenge from ex-Senator Lawton Chiles. Chiles carried Dade with 63 percent of the vote. (See Table 6)

28. After the 1982 reapportionment, and a shift from multi-member to single-member House and Senate districts, the 1982 election brought a change in the Democratic domination of the delegation. Cuban-American Republicans captured three lower house seats in the newly created, heavily Hispanic districts. A fourth Cuban Republican lost by the narrowest of margins after the absentee ballots were counted. While not the first Cubans to serve in the Florida legislature (Fernando Figueredo of Key West served in the House during the 1885 session) 1983 marked the introduction of Cuban-Americans as a permanent fixture in state legislative politics.

29. The change in Cuban-American voting behavior was accompanied by a similarly dramatic change in Hispanic voter registration. In less than 10 years, Democratic party registration among Hispanics in Dade County, dropped from 49 to 24 percent. The resultant increase in the ranks of Republican Hispanics has therefore been remarkable, increasing from 39 to 68 percent of all registered Hispanics. In fact, while overall Hispanic registration has increased by over 56,000 during the past nine years, Hispanic Democratic registration has faced a real loss of over 14,400. Thus, new Hispanic registrants are not only registering as Republicans, but voters are changing their registration, leaving the Democratic party by the thousands. Moreover, prominent Florida Hispanics have abandoned the Democratic party in significant numbers, such as Governor Bob Martinez, State Representative Lincoln Diaz-Balart, and City of Miami Mayor Xavier Suarez.

30. Black Miamians also vote in blocs. The nationwide pattern of strong Black support for the Democratic

party is repeated in Dade. Black registration is 90 percent Democratic. The antipathy of Black voters to Republican candidates is illustrated in recent presidential and state-wide races were no GOP candidate received more than 12 percent of the Black vote. (See Table 7) Blacks also vote heavily for Democratic candidates in state House and State Senate elections.

31. Consequently, Dade's black community has been historically under-represented in the county's delegation to Washington and Tallahassee. No Black has ever been elected to Congress from Dade, although Afro-Americans make up nearly one-fifth of the county's registered voters and there is a large Black population in adjoining Broward county. Blacks benefitted from the 1982 reapportionment and the shift from multi-member to single-member House and Senate district, but they are still under-represented at the State Legislature. After the 1982 reapportionment Blacks gained only one more seat to the State House (going from two to three) and won their first State Senate seat. In 1990, Black's picked up their fourth House seat from Dade, when Daryl Jones won the race in the 118th District. But the District's Voting Age Population is less than 30 percent Black making the seat vulnerable to a White challenger.

32. Non-Hispanic Whites also show some indication of partisan bloc voting. Traditionally, Dade's county White voters are among the most liberal in Florida, and tend to support Democratic candidates for state office. Dade county voters only once supported the Republican candidates for the U.S. Senate or Governor since 1970 (Bob Martinez 1986). However, in that election non-Hispanic White voters supported the Democratic candidate. At the same time, since 1970 Dade voters have only supported the Democratic presidential candidate once (Jimmy Carter in 1976). Although Dade's non-Hispanic Whites voters supported GOP presidential candidates in 1972, 1980, and 1984; they did slightly support

Democrat Michael Dukakis in the 1988 election. (See Table 8) Thus, while not as dramatic as the heavy Hispanic backing for Republican candidates and Black support for the Democrats, Dade's non-Hispanic Whites do exhibit some indication of political cohesiveness. However, when ethnic or racial factors dominate an election Whites vote overwhelmingly in blocs.

B. Polarization

33. The ability of either the Hispanic or Black communities to elect candidates of their choice is severely handicapped in Dade by bloc voting along ethnic lines. Minorities are usually only able to elect their candidates when they are firmly in the majority. Moreover, White candidates are aided by the deep cleavages between Republican Hispanics and Democratic Blacks. In Dade's tripartite political structure non-Hispanic White voters tend to hold the balance of power. There are four types of racially polarized elections in Miami: First, are races featuring a Hispanic candidate versus a White candidate with Black supporting the White candidate; Second, a Black candidate versus a White candidate with Hispanic voters supporting the White candidate; third, a Black candidate versus a Hispanic candidate with White voters holding the balance of power, and finally they are races between two candidates of the same ethnic group in which voters from the other two group support the least ethnic of the two candidates.

34. the recent special election in Florida's 18th Congressional district—held for twenty eight years by Representative Claude Pepper—is one of the clearest examples in recent years of a campaign and election in which ethnic factors predominated over all others. This election largely demonstrates the capacity of ethnicity to override partisanship and all other issues in a particular context. Political newcomer Gerald Richman was able to mobilize the districts non-Hispanic groups (Blacks and

Anglos) in a campaign to stop the Cubans. In so doing he was able to turn what had looked like a walkover for the Republicans into a very close race. However, in turning the election into a referendum on Cuban empowerment, Richman also guaranteed that he would eventually lose the election.

35. In the race to succeed Claude Pepper to Congress, Ros-Lehtinen easily won the republican nomination, facing only token opposition. On the Democratic side, four major candidates entered the race, the front runner was Miami City Commissioner Rosario Kennedy, a Cuban-American who was convinced by Democratic State Chairman Simon Ferro to run, lawyer and political newcomer Gerald Richman, Claude Pepper's niece Joanne, and FIU professor and black community activist Marvin Dunn. Kennedy won the first primary but was forced into a run-off by a strong showing from Richman. The run-off campaign between Kennedy and Richman became a bitter ethnic confrontation, indeed apart from ethnicity, there was little else to divide the candidates. Kennedy took particular exception to Richman's 'American Seat' slogan regarding it as a subtle exploitation of resentment against Cuban-Americans like herself. She picked up valuable endorsements from Joanne Pepper and from defeated Black candidates Dunn and Wright. Richman, by contrast, found himself condemned by Dade's Fair Campaign Practice Committee—a bipartisan, quasi-official, 'watchdog' body—the Miami Herald (which backed Kennedy), and the Spanish-American League Against Discrimination for his 'divisive' 'American Seat' slogan. Richman easily defeated Kennedy in the second primary with over 60 percent of the vote mainly due to his lock on the Miami Beach vote. Kennedy's Labor and Black endorsement were insufficient to withstand the groundswell of Democratic support for Richman, who seemed to have catalyzed Anglo discontent with Miami's increasingly dominant Cuban-American political establishment, to astonishing extent.

36. The general election campaign was even more dominated by the 'ethnic issue' than the primary had been. Richman failed to get the endorsement of an embittered Rosario Kennedy, and Dade's only other prominent Cuban Democrat—Hialeah Mayor Paul Martinez was forthright in his condemnation of Richman's campaign tactics:

> If you really care about the community, you cannot vote for this man. I do not think that his campaign is what the Democratic party stands for.

Ros-Lehtinen also attacked Richman as a 'bigot', and announced that she would not engage in any face-to-face debates with him during the campaign. The campaign subsequently became extremely embittered, with Ros-Lehtinen largely evading other issues and concentrating her attacks on Richman's 'bigotry', and Richman, accusing Ros-Lehtinen of using bigotry as an excuse for not facing up to a debate on issues such as abortion and gun control—on which his views were more in line with those of the district than hers.

37. The campaign strategies of both campaigns were based purely on ethnic calculations. The race came down to a pure ethnic conflict, despite Richman's attempt to back-peddle from his earlier rhetoric. Ros-Lehtinen abandoned attempts at 'bridge-building' with Jews and Blacks, and concentrated on mobilizing her Cuban base. Polls indicated however, that Richman's cultivation of the ethnic issue had turned what initially looked to be an easy election for the Republicans into a very close race. Miami Herald polls showed the two candidates to be neck-and-neck with the whole election largely to be decided by the ethnic turnout factor.

38. On election day Gerald Richman was defeated by a large and monolithic Cuban-American vote. Richman's "American seat" slogan which was the key to victory in the Democratic runoff proved to be a two-edged sword. Cuban-Americans offended by the perceived racism of the Richman voted for Ros-Lehtinen

by the remarkable margin of 88 to 12 percent. The mobilization of the Cuban community around the Ros-Lehtinen was overwhelming and impressive. Local Cuban media, five radio and two T.V. stations, bombarded the airwaves on election day with anti-Richman propaganda including the dubious claim that Fidel Castro himself had endorsed the Democratic candidate. Richman carried all of the other blocs of voters: Jewish, Anglos, and Blacks but they represented only 47 percent of the electorate. High Cuban turnout—some Little Havana precincts reported 70 percent turnout—provided Ros-Lehtinen with the margin of victory, 53 percent of the votes. Ros-Lehtinen won simply because more Cubans voted and almost all of them voted for Ros-Lehtinen.

39. The electorate in the 18th Congressional District became divided along ethnic lines not because Cubans changed their voting behavior, but because other groups rallied around Richman in a futile attempt to "stop the Cubans." (See Table 9) The tragedy of the 1989 Special election was that Richman's coded call to U.S.-born voters ("this is an American seat") to stop the Cuban candidate, which included Kennedy in the Democratic primary and Ros-Lehtinen in the general election, worked. In the general election Richman carried all the non-Cuban groups in the district (Anglos, Blacks and Jews) according to the *Miami Herald* exit poll he even won among Republican Anglos 55 to 45 percent.

40. Ros-Lehtinen while not differing in any significant policy issue with Bush, Mack or Martinez did very poorly among their non-Hispanic supporters in the Eighteenth District. The Cuban Republican candidate ran nearly twenty percent behind Anglo Republicans in the non-Hispanic white precincts of Dade county. (See Table 10) Two communities reflect just how ineffective Ros-Lehtinen's campaign was among non-Hispanic groups. Bal-Harbour an affluent non-Hispanic White neighborhood which gave President Bush 50 percent, Mack 44 percent,

and Martinez 52 percent of the vote gave Ros only 16 percent. Similarly in the heavily Republican island of Key Biscayne, Ros received barely 48 percent of the vote, while Bush received 70 percent, Mack 59 percent and Martinez 68 percent.

41. The anti-Latin nature of the Richman's support is reflected in its close correlation to the yes vote on Amendment Eleven in the 1988 election. Proposition Eleven was the "English as official language" amendment to the Florida state constitution. Hispanics were the only group that consistently opposed the amendment, voting over 80 percent against the measure. A district-wide analysis shows that the Ros votes correlates more closely with the no vote on Amendment 11 than with that of any other Republican candidate. (See Table 11) This trend is even more pronounced in the non-hispanic precincts, in those areas Ros-Lehtinen votes only correlated with the no on Eleven vote (.8132) compared with very low correlation betwen her vote and the votes of other recent GOP hopefuls: Bush (.2659), Mack (.5810), and Martinez (.0355). (See Table 12)

42. Although, not as dramatic as the Ros-Lehtinen election, several other Dade races have witnessed the creation of anti-Cuban coalitions of Blacks and non-Hispanic Whites. The 1990 general elections saw several of these polarized races. In three legislative and two county-wide contests Hispanic candidates were opposed by formidable ethnic coalitions. Two Hispanic candidates lost county-wide races for School Board and Clerk of the Circuit Court as Blacks and Anglos voted along ethnic lines for the Non-Hispanic White candidate. An analysis of homogenous ethnic precincts showed that Evaristo Marina lost his bid for the School Board, when 80 percent of the Whites and 92 percent of the Blacks voted for his Anglo opponent. Similarly Tony Cotarelo lost his bid for Clerk of the County Court when 68 percent of the Anglos and 96 percent of the Blacks voted for the non-Hispanic White candidate. Both Marina and Cotarelo

were the candidates preferred by the Hispanic community receiving 71 and 92 percent of the Latin vote respectively.

43. In the 1990 general elections two Hispanic incumbents almost lost their seats in the state legislature to non-Hispanic Whites challengers. It is important to note that in both of these races the *Miami Herald* endorsed the Anglo candidates. Javier Souto was barely re-elected to the State Senate from the 40th district when Tom Easterly won 74 percent of the non-Hispanic White votes and 92 percent of the Black vote. Souto was able to squeak by his Anglo opponent (36,066 to 33,955) by winning over 80 percent of the Hispanic vote. State Representative Al Gutman also almost lost his 105 district seat to a non-Hispanic White candidate. Political newcomer Steve Leifman won 42 percent of the vote in this heavy Hispanic district by carry two-thirds of the non-Hispanic White votes and 83 percent of the Black votes. Gutman survived by winning 92 percent of the Hispanic vote. Meanwhile, Hispanic challenger Orlando Cruz was easily defeated by incumbent Art Simon in another ethnically polarized election in the 116 district despite the fact the Cruz carried 77 percent of the Latin vote. Simon easily won the election (71 to 29 percent) by winning 85 percent of the non-Hispanic White vote. (See Tables 13A and 13B)

44. Unfortunately this pattern of ethnic polarized voting against Hispanics was not restricted to the 1990 elections. Hispanics candidates have been plagued by anti-Latin coalitions since they started contesting elections in large numbers after the 1982 reapportionment. The pattern of bloc voting by non-Latin Whites and Blacks against Hispanics is found in elections at all levels against both Latin challengers and incumbents. The nature of tripartite politics in Dade means that only when Hispanics have a super majojrity can a Latin candidate win.

45. Black candidates have also suffered due to the tripartite nature of Miami politics. Afro-American can-

didates faced the same type of ethnic based anti-Black coalitions that Hispanics encounter. Moreover, fewer Black candidates have aspired to county-wide or Congressional elections. Urban specialists postulate that this is usually due to the heavy financial cost such a race would involved. While Black candidates have been able to raise the relatively modest amount needed to finance state House and Senate elections, much of it from their own communities, Black candidates who are not supported by the non-Latin White communities have not been able to raise the monies from their own communities to finance a county-wide or Congressional election.

46. Black candidates faced with a White-Hispanic coalition and lacking adequate finances have largely been limited to running in the three state House districts (106, 107, 108) and in the one state Senate district (36) were Blacks comprised an overwhelming majority. The only exception, besides the occasional token Black Republican involved in a hopeless race, was the case of state House district 118. Blacks, while comprising only 29 percent of the population, have a much greater influence because most of the Hispanics in the district are not U.S. citizens (many are undocumented migrant farmworkers from Mexico). Thus Blacks are over a third of the registered voters and a majority of Democratic voters. In 1986 Bob Starks, a White Republican, barely beat Nathaniel Edmond, a Black Democrat in the general election. Stark won despite the fact that Democrats out-registered Republicans in this district 21,202 to 9,968. Stark won by carrying nearly all the White votes in the district and Edmond had the support of almost all the black voters. However in 1988 Tom Easterly, a White Democrat, defeated Stark by the narrowest of margins 9,992 to 9,989. Easterly did not seek re-election in 1990; instead he decided to run for the state senate. This opened the door for Daryl Jones, a Black democrat, who won the 1990 election despite losing the White vote. Jones beat John Minchew 64 to

36 percent because more Blacks turn out at the polls, and he carried enough of the White vote (24 percent) to put him over the top. (See Table 14)

47. Blacks candidates have also fared poorly in seeking county-wide office. The two "preferred candidates" of Black voters were defeated in the 1990 election for County Commissioner by an Anglo-Hispanic coalition. Arthur Teele, a Black Republican, defeated Barbara Carey for the seat traditionally reserved for a Black on the County Commission. Carey campaigned as a strong advocate of Black interests and sought to distance herself from her previous image as a moderate ethnic political figure. This strategy backfired as she succeeded in losing support from non-Hispanic White voters and Hispanics. Carey was clearly the favorite of the Black community who gave her 85 percent of the vote, but Teele easily defeated her by carrying both the non-Hispanic White and Hispanic vote by large margins. In the race for the seat vacated by Barry Schrieber, Mary Collins defeated Betty Ferguson in another ethnically polarized vote. Ferguson was the preferred candidate of Black voters (96.6 percent) but was rejected strongly by Hispanics (19.4 percent) and by non-Hispanic Whites (14.1 percent).

46. The poor showing by Black and Hispanic candidates in county races illustrates the point that, given the polarized nature of Dade County politics, the only way a minority candidate can be elected is in a majority minority district. Besides some token minority representation on the County Commission and the School Board and the exception victory of Daryl Jones in House district 118, all other political gains by Hispanics and Blacks have come in majority minority districts. Thus, non-Hispanic Whites have taken advantage of tripartite politics and their control over the media and business establishment to maintain their control over the political system. This is reflected in their over-representation in the Dade delegation to Tallahassee and Washington.

IV. REAPPORTIONMENT

A. Current Districts

49. Minority communities have been handicapped in electing their "preferred candidates" by the current districting scheme. The current apportionment of Legislative and Congressional districts has diluted the voting strength of both Hispanics and Blacks. Despite a decade of tremendous population growth in the Hispanic community, no new seats have been gained by Hispanics to the state House since 1984. Moreover, the recent gains in the state Senate (34th District, 1986; 40th District, 1988) and in Congress (1989), with one exception (the 33rd Senate District, 1988) came only after very polarized ethnic elections. Blacks have fared even worse. From 1982-1990 Black representation in Tallahassee has remained constant at three state House seats (106, 107, 108) and one state Senate seat (36), all in heavily Black districts. Only the 1990 victory of Daryl Jones in the 118th district has broken this pattern of Black frustration. Meanwhile, non-Hispanic Whites have retained the lion's share of Dade county political power controlling, with only 32 percent of the population, ten out of the twenty state House seats and three out of the seven state Senate seats. Thus, non-Latin Whites have maintained their control of the Dade delegation in Tallahassee despite significant population gains by both Hispanics and Blacks. (See Table 15)

50. Two majority Hispanic state Senate seats were created (33rd and 34th), but with heavy Hispanic population growth the 40th district also became a majority Hispanic district, going from 40% Hispanic in the 1980 census to nearly 60 percent Hispanic in the 1990 census. (See Table 15) The 40th District elected its first Hispanic in 1988. The 35th state senate district, while still held by a non-Hispanic White, also became a majority Hispanic district during the last ten years going from 39

percent to 54 percent Hispanic. The growth in the Hispanic population in these districts reflects the Hispanic population explosion in West Kendall, Kendall Lakes, West Dade and the South Beach areas. Thus, the Hispanic population was not greatly diluted in the State Senate districts; in fact, less than 17 percent of the entire Hispanic population of Dade reside in the three other current Dade state senate districts. However, Blacks have not fared as well as Hispanics in the state Senate. The 36th District is the only majority Black state Senate district in Dade, while both the current 33rd and 39th district contain large numbers of Blacks. Moreover, the large number of Blacks (73.14) in the 36th District raises the question of packing.

B. Senate Joint Resolution 2-G

51. On April 14, 1992, the Florida Legislature passed a new plan for the apportionment of the Florida Senate and the Florida House of Representatives. Both of these plans fail to create the maximum number of majority minority districts. In fact, the plans, instead of maximizing minority representation, seem designed to protect powerful non-Hispanic White incumbents. Moreover, the legislative plan is designed to elect non-Hispanic Whites by exploiting ethnic tensions and polarized voting patterns in Dade.

52. The plan for the apportionment of the state Senate seems specifically designed to dilute Hispanic voting strength. SJR-2G did leave in place the three super majority Hispanic districts and the one majority Black district in Dade. But, it divided the large numbers of Hispanics (133,643) who lived in the old 35th district. Hispanics comprised, according to 1990 census, almost 55 percent of the Voting Age population of the district. The total number of Hispanics in the successor district (38th state Senatorial district) was reduced to 99,908 even though the district actually increased in population

from 244,914 to 316,872 as large sections of the old 37th state Senate district were added to the old 35th district. (See Table 16) Most of the Hispanics were placed in the new 40th (the old 39th) state Senatorial district (which includes all of Monroe County) increasing the Latin population of that district from 50,541 to 74,666; others were put into the heavily Hispanic 34th district, and a section of Hialeah and Little Havana were then taken from the 34th district and the 33th district (the new 39th) and put in the predominately Black 36th district. The Hispanic population of the 36th district increased by over 40,000 to 97,477. The result of this redistricting is that 28.55 percent of the Hispanic population of Dade will reside in state senate districts (36, 38, 40) that Hispanics will have absolutely no possibility of winning. (See Table 16)

53. The Legislature attempted to justify the fracturing of the Hispanic vote by maintaining that it was the only way to create a Black influence district. The Black influence district created by the Legislature does not in fact offer Blacks the opportunity to elect candidates of their choice. A corridor of the proposed 40th District cuts through the heavily Hispanic sections of the city of Miami (parts of census track 26, 66.01 and 66.02) to connect with a Black section of the city (18.01, 18.02, 18.03, 20.03, 20.4, 22.01, 23, 25, 29, 30.1, 34, 36.01) creating a salient of the 40th District in the Liberty City area. The new district connected the Black pockets of Southern Dade county with Liberty City. The old 36th senatorial district contributed about 60,000 Blacks to the Liberty City salient and made up the population, as noted above, by adding some heavily Hispanics census tracts in Hialeah and Little Havana areas to the still predominately Black 36th district. However, while the Black population of the 40th (the old 39th) district will increase from 41,303 to 119,854, Blacks will only comprise 32.86 percent of the district's voting age population. Non-Hispanic Whites will still be the largest group with over 42 percent of the voting age population. The tradition of polarized ethnic voting, with Hispanics joining with Anglos to defeat Black candidates, will probably result in the election of a non-Hispanic White state senator from the 40th district. (See Table 17) Moreover, the Legislative plan dramatically reduces the number of Black Voting Age population in the old 36th Senatorial district from 73.19 to 49.68 percent while the Hispanic VAP climbs from 26.09 to 33.13 percent. While the seat will probably remain safe for incumbent Carrie Meek, it could create problems in the future for other Black candidates, especially given the history of polarized voting in Dade.

54. The new proposed state Senate districts severely dilute the Hispanic vote and fail to create a new majority Black district. Moreover, both the new 38th and 40th district will be much more Democratic, as the 38th loses 35,000 mostly Republican Hispanics and the 40th gains 70,000 mostly Democratic Blacks. The Senate apportionment of SJR-2G fails to treat minorities fairly. However, it does guarantee the election of two non-Hispanic White Democrats in the 38th and 40th state Senate districts at the expense of Hispanics and Blacks. Racially polarized voting in Dade will prevent the election of Black and Hispanic candidates in these senate districts. The negative effects that polarized voting has on minority candidates was illustrated in the 1990 election when Javier Souto was barely re-elected to the State Senate from the 40th district. In that election, Tom Easterly won 74 percent of the non-Hispanic White vote and 92 percent of the Black vote. Souto was able to squeak by his Anglo opponent (36,066 to 33,955) by winning over 80 percent of the Hispanic vote.

55. In summary, SJR-2G dilutes minority voting strength and will leave non-Hispanic Whites over-represented at Tallahassee. As the reapportionment per SJR-

2G dilutes both Black and Hispanic votes and fails to maximize the representation of said groups it violates the Voting Rights Act.

C. Reaves/Brown: An Alternative not Chosen

56. In sharp contrast to SJR-2G, the Reaves/Brown plan, which was introduced and voted down in the legislature, would have maximized the voting strength of minority groups. It increases the number of majority Hispanic state Senate districts from three to four and maintains a super majority for Black voters in the 36th Senatorial district. The plan also maximizes minority influence in the State House. Instead of creating just nine Hispanic majority districts in Dade (as per SJR-2G), it creates eleven. Blacks also gain with this plan for instead of just three strong and one weak Black majority district (as per SJR-2G), the plan creates four strong Black majority district and a very strong Black influence district.

57. The plan avoids the dilution of Hispanic voting power that plagues the SJR-2G reapportionment of the Florida Senate. The plan, instead of dividing Hispanic voters between the old 35th and 39th districts, concentrates these Latin voters in a more Hispanic 35th district. The Latin voting age population of the district would increase from the current 54.56 to 65.65 percent. The Reaves/Brown plan assures this level of Hispanic voters. The 36th district would retain its super majority of Black voters (59.75). This compares favorably with SJR-2G which reduces the Black voting age population in the 36th district to 49.68.

58. The Brown/Reaves plan for the apportionment of the Florida Senate and House maximizes the influence of both Hispanics and Blacks in electing candidates of their choice. The plan, by creating new majority minority districts in both the Florida Senate and the House, is clearly within the provisions of the Voting Rights Act.

D. The DeGrandy Plan (Plan 275)

59. The DeGrandy plan also maximizes the number of minority majority seats in South Florida but uses a different technique than Reaves/Brown. It retains the three super majority Hispanic state Senate districts and maintains one majority Hispanic district (55 percent) while creating two majority Black districts, one entirely within Dade (36) and the other (32) including Black populations in Broward. (See Table 18) The plan voids the dilution of Hispanic and Black voting power that plagues SJR-2G apportionment of the Florida Senate. The plan, instead of dividing Hispanic voters between the old 35th and 39th districts, maintains a Latin Majority in the 35th district. The Hispanic voting age population of this district would remain at about 55 percent. (See Table 18) However, while Reaves/Brown places all the Hispanic Senate districts within Dade, the DeGrandy Plan, in order to accommodate a second Black district, is forced to place part of the 33rd district in Broward.

60. The DeGrandy plan maximizes Black representation by creating two majority Black Districts. The 36th district would retain its majority of Black voters without packing (57.3). This compares favorably with SJR-2G which reduces the Black voting age population in the 36th district to 49.68. The proposed 46th district stretches from the large Black communities of North Dade through a thin corridor around U.S. 1 and picks up pockets of Black voters in South Dade (Coconut Grove, Richmond Heights, Perrine) all the way down to Florida City. The DeGrandy plan also recognizes the community of interest between the Black population in North Dade and Broward county by creating the 32nd district which joins the Black neighborhoods of Ft. Lauderdale, Dania, Hollywood, and Pembroke Park with Opa Locka, and North Dade. The DeGrandy plan goes far beyond either

SJR-2G or even the Reaves/Brown in empowering the Black communities of South Florida.

61. The DeGrandy plan for the apportionment of the Florida Senate and House maximizes the influence of both Hispanics and Blacks in electing candidates of their choice. The plan by creating new majority minority districts in both the Florida Senate and the House is clearly within the provisions of the Voting Rights Act.

I have personal knowledge of the matters set forth below.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Dario V. Moreno
DARIO V. MORENO

(Notarization Omitted in Printing)

DECLARATION OF ALLAN J. LICHTMAN

(Plaintiffs' U.S. Exhibit #46)

1. I am a professor of history and formerly Associate Dean of the College of Arts and Sciences at The American University in Washington, D.C. I received my PhD in history from Harvard University in 1973, with a specialty in political history and the quantitative analysis of historical data. I am the author of five books and numerous scholarly articles that cover topics such as statistical procedures for analyzing political information, electoral history and prediction, and the social scientific analysis of voting rights issues. My publications have appeared in scholarly journals such as *Proceedings of the National Academy of Sciences, Journal of Interdisciplinary History, Political Methodology, Journal of Law and Politics, and The American Historical Review*. I have been a consultant or expert witness for plaintiffs and defendants in more than 50 voting rights cases.

2. I have been asked by the Department of Justice to review documents prepared by the state of Florida defendants and their experts or consultants. My purpose is to use the information contained therein to provide analyses of the following issues in Dade County: a) racially polarized voting, including minority political cohesion and white crossover voting; and b) the opportunities for minority voters to elect representatives of their choice in particular House and Senate districts. Given that the issues in Dade County focus on the creation of additional Hispanic districts, the polarization analysis will focus on Hispanics. But the analysis will also consider the viability of black districts created as part of plans that expand the number of Hispanic-majority districts in Dade County.

3. Documents prepared by the state of Florida and their experts and consultants include considerable information of the kind usually relied upon by social scientists for analyses of voting rights issues. This data includes

ecological regression, extreme case analysis, and the results of elections recompiled to cover the precincts within particular House and Senate districts. My examination of the reports, which include methodological discussion, indicate that these procedures were appropriately applied to electoral data in Dade County.

4. For purposes of this analysis, racially polarized voting is defined as the extent to which members of distinct racial or ethnic groups support different candidates of their choice. Polarized voting can be partitioned into two parts. Minority cohesion is the extent to which minority voters support candidates of their choice. White bloc voting is the extent to which whites support different candidates. Racially polarized voting is politically significant if, under a given electoral system, it impedes the opportunities for minority voters to elect candidates of their choice.

5. Reports prepared by expert consultants for the State of Florida present ecological regression and extreme case analyses of 13 elections in which Hispanic candidates competed against non-Hispanics for State Senate or State House positions. This represents a sufficient base of data from which to draw conclusions about polarized voting, cohesion, and bloc voting in state legislative elections. The results of the experts' state legislative analyses are reported in Table 1. In addition, the experts also provided some analyses of other types of elections held in Dade County. For completeness, these results are reported in Table 2.

6. The results reported in Table 1 show a clear pattern of racially polarized voting, Hispanic cohesion, and white bloc voting. It also shows that black voters united with white voters in opposition to Hispanic candidates for Senate and House positions. In every election studied, Hispanics voted for Hispanic candidates in greater proportion than either whites or blacks. The results reported in Table 1 show a pattern of strong political cohesion.

By generally overwhelming majorities, Hispanic voters preferred to elect Hispanic candidates to state legislative positions. In 11 of 13 elections for the Senate or House, ecological regression results show that more than 75 percent of Hispanic voters opted for the Hispanic candidates. The only exceptions were one three-way primary (State House District 114, 1990) and one nearly uncontested primary (State Senate District 40, 1986). On average, for all 13 elections, the mean Hispanic vote for Hispanic candidates was 79 percent, whereas the mean Hispanic vote for non-Hispanic candidates was 21 percent.

7. The results presented in Table 1 likewise show a pattern of strong bloc voting by whites for non-Hispanic candidates. In 11 of the 12 elections for which data on whites is presented, a majority of whites voted for non-Hispanic candidates. In 10 of the 12 elections the white majority for non-Hispanic candidates was two-thirds or more. On average, for all 12 elections, the mean white vote for non-Hispanic candidates was 76 percent, compared to a mean white vote of 24 percent for Hispanic candidates.

8. Results for legislative elections, reported in Table 1, also indicate that blacks joined with whites in opposing Hispanic Senate and House candidates. Table 1 shows that the consultants were able to derive just one ecological regression estimate of black voting behavior for a general election with an Hispanic candidate (State House 105, 1990). The Table shows a black vote for the Hispanic candidate of 16.1. The consultants also derived one ecological regression estimate for a Republican primary (State House District 118, 1986). It shows a black vote for the Hispanic candidate of 7.8 percent. In addition, the consultants presented two extreme case results for black voting in general elections (State Senate District 40, 1990 and 1986) with an Hispanic candidate. These results show that in 1990 3.7 percent of the vote in predominantly black precincts was cast for the Hispanic candidate and in 1986, 2.6 percent of the vote in pre-

dominantly black precincts was cast for the Hispanic candidate. Finally, the analysis includes one extreme case estimate for a Republican primary (State Senate District 40, 1986). In this election, 10.0 percent of the vote in predominantly black precincts was cast for the Hispanic candidate. Thus the estimates of black voting show less than a 20% black vote for Hispanic candidates.

9. These findings of Hispanic cohesion and white bloc voting are supported by the analyses of additional local elections in Dade County included in the reports prepared by consultants for the State. In 7 of the 10 elections for local offices in Dade County, a majority of Hispanic voters opted for the Hispanic candidate. In 8 of 10 elections, a majority of white voters voted for non-Hispanic candidates. Again, blacks generally united with white voters in opposition to Hispanic candidates. In 7 of the 9 elections for which ecological regression results are reported, a majority of black voters supported non-Hispanic candidates.

10. The high degree of racially polarized voting documented for legislative elections in Dade County indicates that Hispanic voters would have an opportunity to elect candidates of their choice only in Districts with Hispanic voting-age majorities. Otherwise white bolc voting would usually be sufficient to defeat the candidate of choice of Hispanic voters. This finding is supported by the actual results of Dade County elections. No Hispanic has been elected to a legislative position in a white-majority district. In contrast, Hispanics have uniformly been elected to office in districts with a 59 percent or greater Hispanic majority.

11. Reports prepared by consultants for the State tacitly recognize both that strong polarization exists between Hispanics and non-Hispanics in Dade County and that such polarization impedes opportunities for Hispanics to elect cadidates of their choice. Consultants did not find that any legislative district in Dade County was an ef-

fective Hispanic district (either "competitive" or "safe" for Hispanics) unless it included a substantial Hispanic voting-age majority.

12. As compared to the state's plan, the Reaves/Brown/Hargrett plan for the Senate creates an additional district in Dade County (District 40) with a substantial Hispanic voting-age majority (62.1 percent). The evidence indicates that although such a district would not provide Hispanics a guarantee to elect a Senator of their choice it does provide Hispanics a realistic potential to elect such a Senator.

13. As indicated above, Hispanic candidates of choice have prevailed in every legislative district in Dade County with a 59 percent or greater Hispanic majority. In addition, the baseline votes used by consultants for the state clearly indicate that Hispanics would have a realistic chance to elect a Senator of their choice in District 40. The baseline chosen by the consultants to test the viability of Hispanic districts was the vote for gubernatorial candidate Martinez in the 1986 and 1990 gubernatorial election. This is a very conservative choice for Hispanic districts, because the estimated Hispanic vote for Martinez (59% in 1990) is about 20 percentage points below the estimated mean Hispanic vote for state legislative candidates (which is not fully compensated for by a corresponding increase for the Martinez contest in white crossover voting). Nonetheless, the results of analysis reported in Table 3 show a mean vote of 55 percent for Martinez in Senate District 40 under the Reaves plan. As Table 3 shows, this result for Reaves District 40 is not substantially different from the mean of 56.3 percent for Martinez in the state's plan District 37, a district that the state has certified as including "three effective districts in which persons of Hispanic origin can elect candidates of choice (District 34, 26, and 38). These supermajority districts respect the cohesive Hispanic communities in Dade County." (The Florida Senate, Committee on Re-

apportionment, letter to Steven Mulroy, June 8, 1992, p. 3: it should also be noted that this statement supports the finding of this study that Hispanics in Dade County are politically cohesive).

14. The Reaves/Brown/Hargrett plan provides additional opportunities for Hispanic voters without sacrificing opportunities for black voters in Dade County. Again, use of the state's baseline shows that both Dade County Senate districts in the Reaves/Brown/Hargrett plan provide black voters a realistic potential to elect candidates of their choice. In district 32, Jesse Jackson received 70.2 percent of the 1988 primary vote, Alcee Hastings received 72.4% of the primary vote and 83.5% of the runoff vote, and Shaw received a "yes" vote of 74.3 percent. In district 36, Jackson received 79.3 percent, Hastings 77 percent and 86.4 percent, and Shaw 74.7 percent.

15. As compared to the state's plan for the House districts in Dade County, Table 4 indicates that the DeGrandy plan creates an additional two Hispanic districts. All districts under the DeGrandy plan contain an Hispanic voting age population of at least 64.5 percent, whereas Hispanic districts under the State plan dip down to 63.0 percent. The mean vote for Martinez is the DeGrandy districts is at least 50.9 percent, a shade above the state plan's minimum of 50.6. Given the substantial Hispanic voting age population in the DeGrandy plan and the consistent Martinez vote above the minimum 50.6 percent in the state's districts, the evidence indicates that the DeGrandy districts provide minorities realistic opportunities to elect candidates of their choice.

16. The report by consultants to the state indicate that all the Degrandy districts are "effective" minority districts, although most are regarded as falling into the "competitive" rather than the safe category (Attachment 1). But this subjective categorization lacks both conceptual foundation and proper application to House districts. Consultants' report states that "A Hispanic house

district was considered safe if it was at least 67% Hispanic in total population and if the Hispanic-preferred candidate won both of the elections examined" (Florida House of Representatives, June 4, 1992, letter to John Dunne: attached report of Election Data Services by Dr. Lisa Handley June 2, 1992, p. 4 of EDS report). The report provides no basis for selecting the arbitrary 67% cutoff or the 50% cutoff in the Martinez contests. Moreover, by EDS' own explicitly stated criteria, only 6 of the Hispanic districts in Dade County in the state plan should be regarded as "safe." Districts 102, 107, and 115 have less than a 67 percent Hispanic population. Yet the report counts 8 districts in the state's plan as safe, including 102 and 115 (Attachment 2). For other districts, the classification rests on paper-thin distinctions. In district 113, for example Martinez received 51.3 percent of the vote in 1990 and in district 117 he received 52.0 percent.

17. The DeGrandy plan achieves additional opportunities for Hispanics in these elections without sacrificing opportunities for blacks in Dade County. The DeGrandy plan creates 4 black House districts in Dade County with non-Hispanic black voting age populations of 54.6 percent or more. Even by the state's criteria, these are all classified as "safe" seats for black voters. The state plan includes 4 black districts in Dade County with non-Hispanic black voting age populations of 51.0 percent or more. The state's consultants likewise regard these as "safe" districts.

Pursuant to 28 U.S.C. 1746, I declare, under penalty of perjury, that the foregoing is true and accurate.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN

6/27/92 1:30 AM

AFFIDAVIT OF LISA R. HANDLEY

(Defendants' House Exhibit #19)

STATE OF FLORIDA)
COUNTY OF LEON)

I, Lisa R. Handley, the undersigned being first duly sworn upon oath, do hereby depose and state as follows:

1. I am the Senior Research Analyst at Election Data Services, Inc., a Washington-based consulting firm that specializes in redistricting. I have a Ph.D. in political science from George Washington University and have taught classes in American government, methodology, and voting rights. I have published numerous articles on the subject of minority voting rights and have a book due to be released in August 1992 with Cambridge University Press entitled *The Quest for Minority Voting Equality: A Social Science Perspective*, co-authored with Dr. Bernard Grofman and Dr. Richard Niemi. I have served as a consultant or expert witness in more than a dozen voting rights cases, including *DeGrandy v. Wetherell.*

2. Election Data Services, Inc. was retained by the Florida House of Representatives in 1989 to provide consulting services for the House during the redistricting process. The two major tasks that I have been asked to undertake in this regard have been: 1) a racial bloc voting analysis and a written report outlining my findings ("Voting Rights Act and Redistricting in Florida," January 21, 1992, Draft); and 2) an analysis of the effectiveness of proposed minority districts in the various congressional and legislative plans put forward as well as written reports on the subject both for the earlier congressional case and for the Department of Justice.

3. The racial bloc voting draft report that I prepared has been used by both plaintiff and defendant experts in this proceeding. In the analysis underlying the report I

utilized two standard statistical methods, bivariate ecological regression analysis and homogeneous precinct analysis, to examine all statewide, congressional and state legislative contests since 1986 in the state of Florida that have included a minority candidate. I also looked at a few local contests in six major urban counties in Florida: Dade, Broward, Duval, Hillsborough, Orange, and Pinellas. This analysis allowed me to make estimates of voting patterns and participation rates by race and ethnicity in several areas of Florida.

4. On the basis of this analysis I determined that voting generally tended to be polarized in Florida and that minorities tended to participate at lower rates than whites but that both of these circumstances varied a great deal by district. Accordingly, a jurisdiction-specific analysis must be done in order to reach any conclusions about a given area or district.

5. Because there have been no congressional or state legislative contests that have included minority candidates in the area of Escambia County—and because this is not one of the several major urban areas with a large concentration of minorities that I was asked to examine in more detail—no racial bloc voting analysis was done for Escambia County. For this reason I can offer no conclusions about the existence of racially polarized voting in Escambia County.

6. I was able to reach some general conclusions about racially polarized voting and participation rates with regard to Dade County. I found that voting tended to be racially polarized because whites tended voted for white candidates and not for black or Hispanic candidates, Hispanics tended to vote for Hispanic candidates and not white or black candidates, and blacks tended to vote for black candidates, and not Hispanic or white candidates. Furthermore, blacks in Dade County tended to vote very cohesively, and Hispanics as a whole also voted cohe-

sively. I was also able to establish that minority participation rates, particularly Hispanic participation rates, were much lower than white participation rates in Dade County.

7. These findings have specific implications for drawing minority districts in Dade County. The fact that minorities tend to vote at lower rates than whites indicates that districts with voting age population in excess of 50 percent are necessary for blacks to elect candidates of their choice and that districts far greater than 50 percent Hispanic voting age population are necessary if Hispanics are going to be able to elect candidates of their choice in Dade County. The degree to which these districts must exceed 50 percent minority voting age population varies by district. In fact, a district-specific analysis is necessary to determine if a district is going to be an effective minority district or not.

8. An effective minority district is a district that gives minorities an opportunity to elect candidates of their choice. As Dr. Lichtman pointed out in his testimony before the court on June 27 in *DeGrandy v. Wetherell* with regard to the Dade County Commission districts, there are different degrees of effectiveness—there are "safe," or what he also referred to as "rock solid," districts—that is, districts that are almost certain to elect minority-preferred candidates, and there are districts that give minorities an "equal opportunity to elect candidates of choice" or what I—as well as other political scientists—have referred to as "competitive" districts. I have made this distinction with regard to safe versus competitive minority districts in some of my previously published work (see, for example, Kimball Brace, Bernard Grofman, Lisa Handley and Richard Niemi, "The 65 Percent Rule in Theory and Practice," *Law and Policy*, Vol. 10 (1), January 1988, pp. 43-62). This distinction recognizes the fact that not all "effective" or "viable" districts are equally likely to elect minority-preferred candidates: "safe" districts are more likely to elect a minority-preferred candidate than "competitive" districts.

9. The standard I employed to determine if a district was safe, competitive, or not effective was based on a very thorough analysis I conducted for each proposed district with a minority voting age population greater than 30 percent. This analysis was actually twofold. Because of my extensive experience analyzing proposed minority districts in the state of Florida, I was able to determine that inevitably, if a district was over 67 percent Hispanic in voting age population or over 57 percent black in voting age population, and recompiled election returns indicated that the minority-preferred candidate would have won all of the elections in that district (that is, got 50% or more of the vote in a two-candiate election or received a plurality of the vote in an election with more than two candidates), that district was a "safe" district. I therefore classified it as such and did no further analysis on the district. (This was done, in part, to save time given the large number of districts to analyze in a short span of time.) This does not mean, however, that no other districts other than these districts were considered safe. It merely means that no analysis other than examining recompiled election returns was necessary for these particular districts to be classified as safe.

10. The second step of the analysis included examining all of the remaining minority districts with regard to the following: 1) the black or Hispanic voting age population of the district, 2) the partisan make-up of the district, 3) the degree of minority cohesiveness and white crossover vote to be expected in the district, 3) the relative turnout rates of whites, blacks and Hispanics in the district, 4) recompiled election returns to determine if black or Hispanic statewide candidates that had run previously would have carried the district and 5) whether there was a minority incumbent in the district or not. If a district had less than 57 percent black voting age population, or

67 percent Hispanic voting age population, but recompiled election returns indicated that the minority-preferred candidates would have won all of the contests considered, turnout rates indicated that minority voters would comprise a majority of the voters on election day, and minority voters were cohesive, then this district was classified as safe. If a district met some of these criteria, but not all, then the district was classified as "competitive." If a district met none of the criteria, it was classified as "not effective" at all.

11. This analysis permitted me to compare the number of effective minority districts created in Dade County by each of the plans before this court. There are 12 safe minority districts in SJR 2-G—4 safe black seats and 8 safe Hispanic seats. The DeGrandy Plan has 7 safe minority seats in Dade County—4 safe black seats and 3 safe Hispanic seats. The Reaves, Brown, Hargrett Plan also has 7 safe minority seats in Dade County—5 safe black seats and only 2 safe Hispanic seats. No plan before this court creates a safe—or even a competitive—district in the Escambia County area.

12. Although it is true that both the DeGrandy Plan and the Reaves, Brown, Hargrett Plan create more competitive seats in Dade County than the plan passed by the state legislature, they do so at the expense of creating safe minority seats. Both of these plans have created districts that may elect minority-preferred candidates, but may not—the margins are cut very thin. The only thing that is virtually certain is that both plans have created more districts that will elect Republicans to office.

FURTHER AFFIANT SAYETH NOT.

/s/ Lisa R. Handley
LISA R. HANDLEY

(Notarization Omitted in Printing)

DECLARATION OF ALLAN J. LICHTMAN

(Plaintiffs' U.S. Exhibit #54)

I, Allan J. Lichtman, state the following:

1. I have previously submitted a declaration and testified in this case. I have been asked by the U.S. Department of Justice to analyze new information presented by the state on a) turnout data that may affect opportunities for Hispanics to elect candiates of their choice in various Hispanic districts in Dade County and b) estimates of the Hispanic citizen voting age population in these districts.

2. With respect to opportunities for Hispanic voters in Dade County districts, defendants have presented an analysis purporting to show district-specific turnout rates for State Senate districts. The state's data, taken from statewide general elections, may not accurately reflect turnout in Hispanic v. non-Hispanic state legislative elections. However, taking the state's estimates at face value, when combined with typical Hispanic cohesion and white crossover rates,[1] they show that Hispanics would have a realistic potential to elect legislative candidates of their choice in all 4 districts within the Reaves/Brown/Hargrett plan as well as all 3 districts within the state's plan. It is important to match the general election turnout presented by defendants with general election measures of Hispanic cohesion and non-Hispanic crossover.

[1] To keep the projections for the Hispanic candidates of choice conservative, I eliminated from the mean crossover rate the one election in which a majority of whites (62.6) voted for the Hispanic candidate of choice. Inclusion of this election would have raised the crossover rate from 28.5 percent to 32.3 percent and increased the projection of the vote for Hispanic candidates. Given the lack of significant black proportions in Hispanic districts and the lack of complete measurements in the state's data for black voting, the analysis for this declaration relies on estimates of white votes for the Hispanic candidate of choice (in every instance, the Hispanic candidate).

Measures of cohesion and crossover will be excerpted from Table 1 of my original declaration (that included both general elections and Republican primaries). The methodology used to project votes for candidates of choice of Hispanics is identical to the methodology I utilized as expert for the Department of Justice in *Garza v. Los Angeles County*. Results for the State's plan and the Reaves/Brown/Hargrett Plan are presented in Table 1 of this declaration.

3. The results reported in Table 1 corroborate the analysis presented in the earlier declaration. The projected vote for the Hispanic candidate of choice is at least several percentage points above 50 percent in all three districts in the state's plan and in three districts in the Reaves/Brown/Hargrett plan. In an additional district in the Reaves/Brown/Hargrett plan the projected vote for the Hispanic candidate of choice is just above 50 percent for the 1988 turnout and just below 50 percent for the 1990 turnout. Thus, compared to the state's plan there is one additional district in the Reaves/Brown/Hargrett which provides Hispanics a realistic potential to elect candidates of their choice.

4. I have also been asked to examine estimates presented by experts for the defendants on the percentage of citizen voting-age Hispanics in districts within the state's plan and the Reaves/Brown/Hargrett plan. These estimates are based on a regression analysis of the percentage of voting age citizens in block groups within Dade County and the corresponding percentages of Hispanics and of Cubans. The results of this analysis are not sufficiently reliable, however, to draw conclusions about the Hispanic citizenship percentage of any district within Dade County. The results appear to understate substantially the Hispanic citizenship percentage of Dade County districts.

5. The analysis presented in Table 2 uses the actual number of citizens in Dade County, supplied to me by

the Department of Justice from the 1990 Census. As this analysis demonstrates, estimates presented by experts for defendants understate by more than 80,000 persons the number of voting age citizens in Dade County. A prorated estimate of the number of missed Hispanic citizens equals 65,878. The addition of these missed Hispanic citizens increases the estimated Hispanic citizenship rate by nearly one-quarter, from 38.1% to 47.0%. The influence of the missed Hispanic citizens on Cuban versus non-Cuban citizenship rates cannot be determined.

6. One source of the unreliability of the analysis presented by experts for defendants is a highly questionable means of performing the ecological regression analysis used to estimate citizenship rates. One hallmark of ecological regression analysis is that both the "dependent variable" and the "independent variable" be measured on a common base: that is the percentages have the same denominator.[2] In this case, the dependent variable, the percentage of citizens in a Census bloc is measured as a percentage of voting age population. This means that the independent variables should be likewise be measured as percentages of voting age population. The proper procedure for estimating the percentage of non-Cuban and Cuban Hispanics who are citizens would be to regress the percentage of the voting-age population who were citizens in each census block on the percentage of non-Cuban Hispanics among voting age persons in each block and the percentage of Cuban Hispanics among voting age persons in each block. In this way the Hispanic population is separated without overlap in the equation. As indicated in Attachment 1, however, the citizenship analysis presented to this court includes as its independent vari-

---

[2] "Ecological regression requires that the ratios which comprise independent and dependent variables use the same denominator; 'ordinary' regression does not." James W. Loewen and Bernard Grofman, "Recent Developments in Methods Used in Vote Dilution Litigation," *The Urban Lawyer* 21 (1989), p. 592-93.

ables, "% Hispanic of persons" and "% Cuban of Hispanic persons." The two independent variables in this analysis do not have common denominators. The % Hispanic of persons is measured as a percentage of the voting age population, but % Cuban of Hispanic persons is measured as a percentage of the Hispanic voting-age population. Thus the analysis does not cleanly separate the Hispanic voting age population and could produce erroneous estimates of citizenship rates. Without the opportunity to examine results of an analysis presented in standard form I would have serious questions about the reliability of the analysis performed by defendants' experts.

7. Table 3 applies the re-estimated Hispanic citizenship rate of 47.0 percent to districts within the state's plan and the Reaves/Brown/Hargrett plan. This is only a rough estimate of the percent of Hispanic voting age citizens in each district, but it does show results quite different from those presented by expert for defendants. In two of three districts in the state's plan, the estimated percentage of Hispanics among citizens is above 50 percent; in one district the estimated percentage is just below 50 percent. In three of four districts in the R/B/H plan, the estimated percentage of Hispanics among citizens is above 50 percent; in one district the estimated percentage is just below 50 percent.

Pursuant to 28 U.S.C. 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

/s/ Allan J. Lichtman
ALLAN J. LICHTMAN
6/30/92

TABLE 1

PROJECTED VOTE FOR CANDIDATE OF CHOICE OF HISPANICS GENERAL ELECTIONS, TURNOUT ESTIMATES PRESENTED BY DEFENDANTS COHESION AND CROSSOVER DATA FROM 10 GENERAL ELECTIONS 1986-1990, HISPANIC V. NON-HISPANIC CONTESTS *

Hispanic Cohesion Rate = 87.2% Non-Hisp. Crossover Rate = 28.5

STATE PLAN

I. State Plan: District 39

1988: Percent Hispanic Voters = 59.6%

1990: Percent Hispanic Voters = 54.3%

1. 1988 Hisp Vote For Hisp Cand Of Choice = .872 * 59.6% = 52.0%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 40.4% = 11.5%
3. 1988 Total Vote For Hisp Cand Of Choice = 52.0% + 11.5% = 63.5%
1. 1990 Hisp Vote For Hisp Cand Of Choice = .872 * 54.3% = 47.3%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 45.7% = 13.0%
3. 1990 Total Vote For Hisp Cand Of Choice = 47.3% + 13.0% = 60.3%

II. State Plan: District 37

1988: Percent Hispanic Voters = 49.2%

1990: Percent Hispanic Voters = 46.6%

1. 1988 Hisp Vote For Hisp Cand Of Choice = .872 * 49.2% = 42.9%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 50.8% = 14.5%
3. 1988 Total Vote For Hisp Cand Of Choice = 42.9% + 14.5% = 57.4%
1. 1990 Hisp Vote For Hisp Cand Of Choice = .872 * 46.6% = 40.6%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice = .285 * 53.4% = 15.2%
3. 1990 Total Vote For Hisp Cand Of Choice = 40.6% + 15.2% = 55.8%

TABLE 1: CONTINUED

Hispanic Cohesion Rate=87.2% Non-Hisp. Crossover Rate=28.5

III. State Plan: District 34

1988: Percent Hispanic Voters=44.1%

1990: Percent Hispanic Voters=41.7%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 44.1%=38.5%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 55.9%=15.9%
3. 1988 Total Vote For Hisp Cand Of Choice= 38.5% + 15.9%=54.4%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 41.7%=36.4%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 53.4%=16.6%
3. 1990 Total Vote For Hisp Cand Of Choice= 36.4% + 16.6%=53.0%

REAVES/BROWN/HARGRETT PLAN

I. R/B/H Plan: District 34

1988: Percent Hispanic Voters=52.9%

1990: Percent Hispanic Voters=50.4%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 52.9%=46.1%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 47.1%=13.4%
3. 1988 Total Vote For Hisp Cand Of Choice= 46.1% +13.4%=59.5%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 50.4%=43.9%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 49.6%=14.1%
3. 1990 Total Vote For Hisp Cand Of Choice= 43.9% + 14.1%=58.0%

II. R/B/H Plan: District 33

1988: Percent Hispanic Voters=47.3%

1990: Percent Hispanic Voters=43.1%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 47.3%=41.2%

2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 52.9%=15.1%
3. 1988 Total For Hisp Cand Of Choice= 41.2% + 15.1%=56.3%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 43.1%=37.6%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 56.9%=16.2%
3. 1990 Total Vote For Hisp Cand Of Choice= 37.6% + 16.2%=53.8%

III. R/B/H Plan: District 40

1988: Percent Hispanic Voters=45.5%

1990: Percent Hispanic Voters=42.9%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 45.5%=39.7%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 54.5%=15.5%
3. 1988 Total Vote For Hisp Cand Of Choice= 39.7% + 15.5%=55.2%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 42.9%=37.4%
2. 1990 Non-Hsp Vote For Hisp Cand of Choice= .285 * 57.1%=16.3%
3. 1990 Total Vote For Hisp Cand Of Choice= 37.4% + 16.3%=53.7%

III. R/B/H Plan: District 35

1988: Percent Hispanic Voters=37.8%

1990: Percent Hispanic Voters=34.8%

1. 1988 Hisp Vote For Hisp Cand Of Choice= .872 * 37.8%=33.0%
2. 1988 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 62.2%=17.7%
3. 1988 Total Vote For Hisp Cand Of Choice= 33.0% + 17.7%=50.7%
1. 1990 Hisp Vote For Hisp Cand Of Choice= .872 * 34.8%=30.3%
2. 1990 Non-Hisp Vote For Hisp Cand Of Choice= .285 * 65.2%=18.6%
3. 1990 Total Vote For Hisp Cand Of Choice= 30.3% + 18.6%=48.9%

THE VOTING RIGHTS ACT AND REDISTRICTING IN FLORIDA

(Plaintiffs' U.S. Exhibit #47)

ELECTION
DATA [LOGO]
SERVICES INC.
1225 I Street, NW, Suite 700
Washington, DC 20005-3914

The Voting Rights Act (hereinafter "VRA"), 42 U.S.C. § 1973, is the primary statutory mechanism for enforcing the voting provisions of the Fourteenth and Fifteenth Amendments to the U.S. Constitution. The Act contains two significant provisions, § 2 and § 5, which effect the redistricting process.

Section 5 requires covered jurisdictions to "preclear" any change in their electoral laws, practices or procedures with the U.S. Department of Justice or the U.S. District Court for the District of Columbia before the change may be implemented. To obtain preclearance, a covered jurisdiction must establish that the voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group." Five minority groups are protected under Section 5: blacks, Hispanics, Asians, Native Americans and Aleutians.

Historically, the Department of Justice and federal courts have applied the same standards in reviewing submitting changes under Section 5. However, in 1987 the Department of Justice promulgated new guidelines for the administration of Section 5 which were a marked departure from the standard applied by the U.S. Supreme Court. *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, 28 C.F.R. sec. 51.55.

The Department of Justice can object to state redistricting plans if: (1) there is evidence of discriminatory

intent; (2) the plan results in a retrogression from existing levels of minority voting strength; or (3) the plan clearly violates Section 2 of the Voting Rights Act. A determination by the Department of Justice that the submitted plan merits preclearance does not preclude a subsequent challenge under Section 2 of the Act.

Only five counties in Florida are covered by § 5: Collier, Hardee, Hendry, Hillsborough and Monroe Counties. However, the Justice Department may require the state to submit its statewide redistricting plans for preclearance.

In contrast to the limited coverage of § 5, § 2 of the Act can be used to challenge "any voting qualification or prerequisite to voting or standard, practice or procedure anywhere in the United States." In 1982, Congress amended § 2 of the VRA, eliminating the intent requirement introduced by the Supreme Court in *Mobile v. Bolden*, 446 U.S. 55 (1980), and instead establishing that a § 2 violation could be proven by showing that a challenged electoral practice had a discriminatory effect on minority voters.

The Supreme Court was presented with its first opportunity to interpret amended § 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In discussing the plaintiffs' claim that the establishment of five multimember districts in the redistricting plan for the North Carolina State House of Representatives impaired black citizens' ability to elect representatives of their choice, a majority of the Court determined that plaintiffs must establish three threshold factors:

1. the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;

2. the minority group must be able to show that it is politically cohesive;

3. the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

The lower courts have subsequently applied the three part test outlined in *Gingles* to all challenges brought under § 2, including challenges to single member districts. The *Gingles* factors are a necessary threshold but are usually not sufficient, in and of themselves, to prove a violation. If the three factors are satisfied the courts will review the totality of the circumstances to determine the existence of a voting rights violation. However, the failure to meet a single *Gingles* factor is usually fatal to a vote dilution claim.

In *Gingles*, the Supreme Court made it clear that the evidentiary "linchpin" of a majority vote dilution claim is racially polarized voting. The Court identified racial bloc voting as the foundation of two of the three elements of the results test; one, a racial bloc voting analysis is needed to determine whether the minority group is politically cohesive; and two, the analysis is required to determine if whites are voting sufficiently as a bloc to usually defeat minority-preferred candidates. If these two conditions are present, and if the minority group is sufficiently large and compact to constitute a majority of a single member district, then districts must be drawn to permit minority voters the opportunity to elect candidates of their choice.

In *Gingels*, the Court held that racially polarized voting exists when there is "a consistent relationship between race of the voter and the way in which the voter votes," or expressed differently, when "black voters and white voters vote differently." Racially polarized voting will not result in a § 2 violation unless it denies to the minority community an opportunity to elect their preferred representatives. Therefore, a racial bloc voting analysis en-

tails comparing the voting patterns of whites and minorities and determining the electoral success of the minority-preferred candidate (legally significant racial polarization exists is voting is polarized and the minority-preferred candidates are usually defeated).

In attempting to ascertain if legally significant racial polarization exists, no circuit with the exception of the Tenth Circuit (*Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), has placed any evidentiary weight on the examination of an election without a viable minority candidate. *Collins v. City of Norfolk*, (4th Cir. 1989); *Campos v. City of Baytown*, (5th Cir. 1988); *Citizens for a Better Gretna v. City of Gretna, La.*, (5th Cir. 1987); *Gomez v. City of Watsonville*, (9th Cir. 1989); *Romero v. City of Pomona*, (9th Cir. 1989); *Solomon v. Liberty County, Fla.*, (11th Cir. 1990). In addition, the analysis accepted by the Supreme Court in *Gingles* did not contain any white-only election contests. For this reason, only election contests that included at least one minority candidate are examined in this study.

Estimating Voting Patterns by Race/Ethnicity

The two widely used, standard analytic procedures for estimating the extent to which minorities and whites have voted differently are homogeneous precinct analysis and bivariate ecological regression analysis. Homogeneous precinct analysis involves examining the voting patterns of precincts that are racially/ethnically homogeneous (or nearly so) and bivariate ecological regression involves a graphical comparison of the votes for candidates in each precinct with the racial/ethnic composition of that precinct.

The principal advantage of homogeneous princict analysis is its simplicity. It requires no sophisticated statistical analysis to produce estimates of a group's voting patterns; the behavior of voters of a given race/ethnicity is directly observable. The major drawback of this type

of analysis is that the entire racial/ethnic group is not considered when deriving an estimate of the group's voting behavior, only the behavior of those members of the group living in homogeneous precincts is analyzed. The principal advantage of bivariate ecological regression is that it makes use of information from all of the precincts, both those that are racially/ethnically homogeneous and those that are racially/ethnically mixed. Bivariate ecological regression is a far more complicated and time consuming procedure, however.

In *Gingles*, the Supreme Court indicated its acceptance of these two complementary estimation techniques. This study employs both of these statistical methods to produce estimates of the percentage of voter of each racial/ethnic group that voted for each of the candidates in the elections examined.

Creating Effective Minority Districts: The Mathematics of Voting Equality

The Voting Rights Act and litigation subsequent to its passage has clearly established the need for jurisdictions to create districts in which minorities will have the opportunity to elect representatives of their choice. The number of such districts, as well as the percentage minority population needed to create these "effective minority districts" varies depending on the locality. When creating minority districts, jurisdictions must be careful to avoid both the unnecessary fragmentation of minority voting strength and the packing of minority districts. For this reason, it is important to undertake a jurisdiction-specific analysis to determine the percentage minority population needed to produce effective minority districts.

Drawing a district in which the minority group has a simple population majority is usually insufficient for creating an effective minority district because it is often the case that, even though minorities comprise half of the population, they may not comprise 50 percent of the voters. There are several reasons for this: there are typically more noncitizens among minority (particularly Hispanic) populations; the voting age population is usually a lower proportion of the total population among minorities; and minorities tend to register and turnout at lower rates than Anglos. Each of these differences has an effect on minority voting strength and therefore must be considered when determining the percentage minority population needed to create an effctive minority district.

The central basis for effective minority voting equality is usually considered to be the percent minority population needed to equalize Anglo and minority turnout at the polls. In order to determine the percentage minority and Anglo turnout, a simple algebraic equation is employed. If, for example, 29 percent of the Anglo population turns out to vote and only 21 percent of the black population turns out, the following equation must be solved (where X is the percentage black in the population, and 21 and 29 are the percentages of Anglos and blacks turning out to vote):

$$21X = 29$$
$$21X = 29 - 29X$$
$$50X = 29$$
$$X = .5800$$

A district with a 58 percent black population would equalize black and white turnout in this particular example.

In this study, the percent black and Hispanic voting age population needed to equalize Anglo and minority turnout is reported whenever it was possible to calculate the relevant turnout rates. (Turnout percentages by race/ethnicity are estimated using the same two techniques described above for producing votes by race/ethnicity.)

The elections analyzed in this report are all recent statewide, congressional and state legislative contests that included at least one minority candidate. Only elections

in 1986, 1988 and 1990 were examined because: one, the data were most accurate for these years and, two, the courts concentrate their attention on the most recent election contests rather than elections that occurred eight or ten years ago. In some areas where it was felt that a more indepth analysis was necessary (major urban counties with a significant minority population), recent local county elections were also studied. These counties included Dade, Broward, Duval, Hillsborough, Orange and Pinellas. The results of this additional analysis are found at the end of the report.

[Tables Omitted in Printing]

FACTUAL INFORMATION IN RESPONSE TO QUESTIONS POSED BY A "NOTICE TO PARTIES" DATED APRIL 30, 1992

Compiled Under the Direction of

George H. Meier
Staff Director

Committee on Reapportionment
Florida House of Representatives

May 6, 1992

RESPONSE TO ONE OF THE SPECIAL MASTER'S 20 QUESTIONS: WHO WAS INVOLVED IN THE REDISTRICTING PROCESS?

(All organizations listed appeared and spoke via a representative, of at least one of the 32 public hearings.)

PARTICIPATING ORGANIZATIONS

State Republican Party
State Democratic Party
Okaloosa School Employees
Okaloosa League of Women Voters
Santa Rosa County Republican Executive Committee
Okaloosa County Democratic Committee
Escambia County Republican Party
Pensacola Bay Area League of Women Voters
Pensacola Branch of NAACP
Escambia Democratic Party
Escambia County Concerned Citizens
Bay County Republican Executive Committee
Bay County Chamber of Commerce
Association of Bay County Educators
Gulf County Classroom Teachers Association
FTP-NEA
Leon County Classroom Teachers Association
Common Cause
Florida League of Women Voters
Tallahassee National Organization for Women (NOW)
North Florida Reapportionment Coalition
Columbia County Republican Party
Lake City Branch of NAACP
Lake City GOP
Marion County Republican Party
University of Florida Student Body
Florida League of Women Voters
Alachau County League of Women Voters
Gainesville Chamber of Commerce
Jacksonville Branch of NAACP
Jacksonville NAACP Reapportionment Committee
St. Johns County Preservation Association
Polk County Coalition for Congressional Unity
Hardee County Democratic Party
Manatee County League of Women Voters
Manatee County Republican Executive Committee
Manatee County League of Women Voters

St. Petersburg Branch of NAACP
Pinellas County Democratic Party
Florida State Conference of NAACP
Democratic Black Caucus of Florida
Pinellas Chapter of the Democratic Black Caucus of Florida
Upper Pinellas Common Cause
Pinellas National Organization for Women (NOW)
Pinellas Park Chamber of Commerce
Dade County Republican Party
Dade County Fair Reapportionment Task Force
Miami-Dade Branch of NAACP
Black Lawyers Association of Dade County
Greater Miami Black Resource
South Florida Association of Black Psychologist
Unrepresented People's Positive Action Council, Inc. (UP-PAC)
Republican Party of Dade County
Florida Young Republicans
Haitian/Carribean Community
Boycott Miami Coalition for Progress
Concerned Citizens of Northwest Dade
Bay View Point Condominiums
Wilshire Condominiums
NEW Democratic Club
Admirals Port Condominum Association
United Democratic Club
South Florida Coalition of Black Trade Unionists
Dade County Democratic Party
McCall Community Foundation
Kendall Federation of Homeowners Association
Black Lawyers Association of Dade County
Mexican-American Council
Vision Council, Inc.
Mexican-American Community
Dade County Fair Reapportionment Task Force
South Dade Community Council
W. Perine Christian Association

Greater Boca Raton Chamber of Commerce
Atlantic Democratic Club
Century Village West Democratic Club
Florida League of Women Voters
Voters Coalition in Palm Beach County
West Boca Community Council
Republican Executive Committee
Democrats of Greater Boca Raton
Dade County Reapportionment Task Force
Rock Island Community Development Group
Broward County Reapportionment Task Force
Urban League
Haitian American Democratic Club of Broward County
Bar Association of Broward County
Black Pan Hellenic Council
Alpha Phi Alpha Fraternity
Dorsey-Riverbed Neighborhood Association
A. Philip Randolph Institute
Broward County Jamaican Citizens
Tri-County Chapter of the National Forum for Black Public Administration
Joint Council of Aventura, Inc.
Concerned Citizens of Northeast Dade County
Point East condos
St. George Civic Association
Lee County Democratic Party
Lehigh Acres Community
Florida Women's Political Caucus-
Charlotte County Republican Executive Committee
Lee County NAACP
Collier County Republican Executive Committee
Collier County League of Women Voters
Collier County NAACP
Taxpayers Action Group (TAG)
Black Betterment Committee
Hendry County Republican Party
Florida Women's Consortium
Golden Lake Village

West Palm Beach NAACP
Democratic Women's Club
Blacks on the Serious Side (BOSS)
St. Lucie County Democratic Executive Committee
Democratic Executive Committee, Redistricting Committee
Martin County Republican Executive Committee
Melbourne/Palm Bay Chamber of Commerce
Delta Sigma Theta Sorority Minority Reapportionment Committee
Brevard County Republican Party
Broward County Reapportionment Task Force
Broward County NAACP
NAACP State Conference of Branches
One Hundred Black Men of Ft. Lauderdale
Orange County Political Coalition
Black Caucus
Deland Chamber of Commerce
Daytona Beach Chamber of Commerce
Mid Florida Business and Research Center
Deltona Municipal Services District
Volusia/Daytona Beach NAACP
Republican Party of Marion County
Polk County Coalition for Congressional Unity
Hillsborough County League of Women Voters
Florida Coalition for Fair Representation
Senior Citizens Downtown
Greater Tampa Urban League, Inc.
Friends and Neighbors in Land-of-Lakes
Brooksville League of Women Voters
Greater Hernando Chamber of Commerce
Greater West Hernando Chamber of Commerce
Republican Party of Hernando County
Dade City Chamber of Commerce
Project PUSH (Political Unity for Spring Hill)
Florida Silver Haired Legislators
Democratic Club of Hernando County
Florida Citrus Mutual

Central Florida Development Council
Polk County Young Democrats
Lakeland Economic Development Council
Department of Florida Disabled Veterans
Polk County League of Women Voters
Orlando/Orange County Convention and Visitor Bureau
Orange County Republican Executive Committee
Orlando Branch of NAACP
Orange County Political Coalition
Cuban American Bar Association
Coalition of Hispanic American Women
Spanish American League Against Discrimination (SALAD)
Nicaraguan American Bankers and Businessman's Association
League Against Cancer, Inc.
Hispanic American Builders Association (HABA)
Dade County Fair Representation Task Force
Dario Las Americas (Newspaper)
Concerned Puerto Rican Alliance
Latin American Chamber of Commerce (CAMACOL)
Association of Afrocuban-Americans
Nicaraguan Medical Association
Hialeah Chamber of Commerce
Hialeah Young Republicans

CENSUS BUREAU CITIZENSHIP DATA

[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washington, D.C. 20233-0001

November 19, 1992

Mr. John Guthrie
Florida Senate
726 Capitol
Tallahassee, Florida 32399-1100

Dear Mr. Guthrie:

This letter is in response to our telephone conversation of November 18, 1992. You requested all available materials concerning the bilingual ballot provisions of Voting Rights Act coverage for Dade County, Florida. A copy of the tabulations for Dade County, and a memorandum describing the full package of tabulations from which they have been taken, is enclosed. As I noted to you in our conversation, a full tabulation of citizenship by race/ethnic statuses does not exist. The tabulations you have here are all that exist on this topic, to my knowledge, for Dade County.

Based on the photocopy charges, the cost of the material you requested is $10.00. Please make your check or money order payable to Commerce-Census and send it, along with a copy of this letter, to the Statistical Information Staff, Population Division, Bureau of the Census, Washington, D.C. 20233.

If I can be of further help, please contact me on (301)-763-1154.

Sincerely,

/s/ Robert Kominski
ROBERT KOMINSKI
Chief, Education and
Social Stratification Branch
Population Division

Florida County Level			Voting Pop. -T-	English Not Only Language -U-	English Less Than Very Well -V-	English Less Than Well -W-	English Not Spoken -X-
A—Florida	12	# Tot.	987346	410532	174722	79437	17382
B—Dade County	025	%	100.0	41.5	17.6	8.0	1.7
		# Ilt.	27868	16707	13619	9822	3775
		%	2.9	4.1	7.8	12.4	21.8
D—American Indian	1	# Tot.	1517	360	169	88	13
E— Total		%	.1	.0	.0	.0	.0
F— Total		# Ilt.	55	44	39	29	3
G— Flags 00001-00001 2240		%	3.7	12.3	23.1	33.0	23.1
D—American Indian	1	# Tot.	112	112	69	25	3
E— Total		%	.0	.0	.0	.0	.0
F—Mikasuki	917	# Ilt.	37	37	32	22	3
G— Flags 00001-00001 2240		%	33.1	33.1	46.4	88.0	100.0
D—American Indian	1	# Tot.	109	88	54	20	3
E—Miccosukee	437	%	.0	.0	.0	.0	.0
F— Total		# Ilt.	32	30	25	17	3
G— Flags 00001-00001 2240		%	29.4	34.1	46.3	85.0	100.0
D—American Indian	1	# Tot.	88	88	54	20	3
E—Miccosukee	437	%	.0	.0	.0	.0	.0
F—Mikasuki	917	# Ilt.	30	30	25	17	3
G— Flags 00001-00001 2240		%	34.1	34.1	46.3	85.0	100.0

Florida County Level				Voting Pop. -T-	English Not Only Language -U-	English Less Than Very Well -V-	English Less Than Well -W-	English Not Spoken -X-
D—American Indian	1	# Tot.		57	28	18	5	0
E—Seminole	438	%		.0	.0	.0	.0	.0
F— Total		# Ilt.		7	7	7	5	0
G— Flags	00001-00001	%		12.3	25.0	38.9	100.0	.0
2240								
D—American Indian	1	# Tot.		20	20	13	3	0
E—Seminole	438	%		.0	.0	.0	.0	.0
F—Mikasuki	917	# Ilt.		5	5	5	3	0
G— Flags	00001-00001	%		25.0	25.0	38.5	100.0	.0
2240								
D—Asian American	3	# Tot.		7972	5092	1950	516	32
E— Total		%		.8	.5	.1	.0	.0
F— Total		# Ilt.		213	161	134	91	6
G— Flag	00100-00000	%		2.7	3.2	6.9	17.7	18.8
D—Asian American	3	# Tot.		1489	1489	981	392	24
E— Total		%		.1	.1	.0	.0	.0
F—Chinese	708	# Ilt.		145	145	118	91	6
		%		9.8	9.8	12.1	23.3	25.0
D—Hispanic	4	# Tot.		350499	332451	153529	73631	16946
E— Total		%		35.4	33.6	15.5	7.4	1.7
F— Total		# Ilt.		14655	13833	11799	9161	3739
G— Flags	11110-01110	%		4.2	4.2	7.7	12.5	22.1
D—Hispanic	4	# Tot.		330493	330493	152886	73403	16933
E— Total		%		33.4	33.4	15.4	7.4	1.7

F—Spanish	625	# Ilt.		13745	13745	11744	9132	3733
G— Flags	11110-01110	%		4.2	4.2	7.7	12.5	22.1
D—Hispanic	4	# Tot.		12744	12136	5832	2037	470
E—Colombian	234	%		1.2	1.2	.5	.2	.0
F— Total		# Ilt.		320	314	254	129	85
G— Flags	00110-00000	%		2.6	2.6	4.4	6.4	18.1
D—Hispanic	4	# Tot.		12050	12050	5832	2037	470
E—Colombian	234	%		1.2	1.2	.5	.2	.0
F—Spanish	625	# Ilt.		314	314	254	129	85
G— Flags	00110-00000	%		2.6	2.6	4.4	6.4	18.1
D—Hispanic	4	# Tot.		46467	42376	16482	7160	1748
E—Puerto Rican	261	%		4.7	4.2	1.6	.7	.1
F—Total		# Ilt.		2891	2646	2171	1629	670
G— Flags	00110-00110	%		6.3	6.3	13.2	22.8	38.4
D—Hispanic	4	# Tot.		42284	42284	16476	7154	1742
E—Puerto Rican	261	%		4.2	4.2	1.6	.7	.1
F—Spanish	625	# Ilt.		2620	2620	2165	1623	664
G— Flags	00110-00110	%		6.2	6.2	13.2	22.7	38.2
D—Hispanic	4	# Tot.		240858	232685	111820	55435	12463
E—Cuban	271	%		24.3	23.5	11.3	5.6	1.2
F— Total		# Ilt.		8939	8500	7488	5943	2348
G— Flags	01110-01110	%		3.8	3.7	6.7	10.8	18.9
D—Hispanic	4	# Tot.		232191	232191	111689	55383	12456
E—Cuban	271	%		23.5	23.5	11.3	5.6	1.2
F—Spanish	625	# Ilt.		8487	8487	7475	5934	2348
G— Flags	01110-01110	%		3.7	3.7	6.7	10.8	18.9

[SEAL]

UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
Washingon, D.C. 20233-0001

June 8, 1992

MEMORANDUM FOR THE RECORD

From: Robert Kominski
Chief, Education & Social Stratification Branch
Population Division

Subject: Detailed Research Tabulations on Voting Rights

This document acts as a guide for interpreting the package of detailed tabulations provided to Congress and the Justice Department in June 1992 for their research in determining the effect of various alternative criteria in the reauthorization of the Voting Rights Act.

There are a number of subtabulations in the package. These are: a summary state-level tabulation, an Indian Reservation tabulation, and detailed tabulations for each state. Each tab has several rows and columns shown for each identified "language minority" group. The colums are labelled as the "Voting Pop" that is, the voting age citizen population, "English not only language"—those who reported they speak a language other than English; "English less than very well"—those who said they speak English well, not well, or not at all; "English less than well"—those who said they speak English not well or not at all; "English not spoken"—those who said they do not speak English at all. Each successive column is a population subset of previous columns.

The first row in a sequence of four shows the estimated number of persons who meet the stated criterion in the column. The second row shows the proportion that a given column is of the total (first column). The third row shows

the number of persons in the column who have completed fewer than 5 years of schooling (that is, are illiterate by definition of the Act). The fourth row shows what percentage the third row value is of the first.

Letters at the left-hand side of the tabulations indicate the "level" of the tabulation. "A" indicates a state or reservation; "B" is a political jurisdiction (generally counties); "C" are subdivisions within counties; "D" are the aggregate language minority groups—American Indian, Eskimo or Aleut, Asian American, and Hispanic; "E" are subgroups of the "D" level, for example, Indian tribes, Eskimos alone, or specific Asian groups like Japanese or Filipino; "F" are specific languages; and "G" is a summary set of ten 0-1 flags which tell the following about the tabulated group:

Flag 1: D-level group exceeded 5% of the total voting age citizens in the state

Flage 2: D-level group exceeded 5% of the total voting age citizens at the B or C level

Flag 3: D-level group exceeded 7,500 voting age citizens at the B or C level

Flage 4: D-level group exceeded 10,000 voting age citzens at the B or C level

Flag 5: D-level group exceeded 5% of the voting age citizens within an Indian reservation

Flags 6-10 repeat this information, but the determination is based on the number of people who speak English less than very well, as opposed to simply all members in the group. In short, the first 5 flags incorporate a qualifying notion similar to that before the passage of the Nickles amendment, while flags 6 through 10 reflect the Nickles amendment criteria.

In general, for the state-specific tabulations, we show a data block (four lines) anytime a group constitutes a minimum of 2% or 3000 of the voting age citizens. In

addition, we show the largest non-English, language, or any that qualify.

The first tabulation is a summary state-level tab only for purposes of determining those states that may qualify for statewide coverage under Section 203c. As can be seen in the printout, in most states no groups qualify, which is why only a total block for the entire state is displayed. In some states a group might qualify if pre-Nickles criteria were used, but in only two states—New Mexico and Texas—does a group (Hispanics) meet statewide qualification under the Nickles guidelines.

The next tabulation shows the results of the Indian Reservation determinations. This tab shows the results for the reservations themselves, that is, which reservations might possibly qualify, and for what group(s) . Note that the determinations are not limited to Indian groups.

The remaining tabulations are the detailed state-specific runs, incorporating both the statewide determination rules, the 5% political jurisdiction rule, the numeric minimum cutoff rule (again going down to 3000 persons), and an Indian reservation qualification rule. In the case of the latter situation, if an area in a county was qualified because of the Indian reservation guideline, the numeric code for the reservation(s) in question is noted immediately below the "G" level line. In Apache County, Arizona, for example, note that the county qualifies for the Apache language because of Reservation 1140. This code denotes the Fort Apache Reservation in Arizona, identifiable by the 1140 code on the "A" line in the reservation tabulation. Looking at the second data panel for that reservation, one can see that Apache speakers who speak English less than very well constitute 38.5% of all the voting age citizens on the reservation, and that this group has an illiteracy rate of 2.6%. Consequently, the reservation qualifies. Since Apache County Arizona contains a part of this reservation, it is qualified by the reservation (even though most of the American Indians

who live in this county speak Navajo, as shown in the Apache County tabulation). Gila and Navajo Counties also contain part of this reservation and for this reason are also qualified by the reservation.

These tabulations were designed to address a wide variety of questions about various alternative constructions and implementations of the Voting Rights Act. If there are questions about any of these data, please contact me on (301)-763-1154.

cc: Schneider (POP)
Norton
Walsh (DOD)
Chron

EXCERPTS FROM THE TRANSCRIPTS OF THE CONGRESSIONAL REDISTRICTING HEARING

5/5/92-5/15/92

TESTIMONY OF THEODORE ARRINGTON
TR VOL. III

* * * *

[6] Q Dr. Arrington, in your opinion, how should a congressional plan be evaluated to determine whether or not [7] it provides a fair opportunity for minorities of race and language to vote and meaningfully participate in the electoral process?

A The first thing you have to look for is whether existing concentrations of the minority population has been cracked or split among several districts.

Q Could you explain what you mean by "cracking"?

A A cracked area is one where an existing minority population is split into two or more districts instead of keeping them together in one district. To the extent that minority concentrations are split or cracked, you have a clear violation of the Voting Rights Act. That's the first thing you do.

Would you like me to go on?

Q I would like you to go on, yes.

A The next thing, though, is a harder question, a question that I think most of this hearing has been about and one in which the Court will have to come up with an answer. All of the plans that have been presented, so far as I can tell, have been careful not to crack existing minority populations. They draw those minority districts somewhat differently from one plan to another, and some of those districts are better than others; but, basically, they have observed that very first rule of not cracking existing concentration of minority population.

[8] The problem comes in with the next step; and that is, what do you do with concentrations of minority population which are not large enough to be the base of a majortiy black or majority Hispanic district? Obviously, you don't crack such small areas. But what do you do with them? Do you put them in a district with white areas so that they will be a minority? Do you take several of these concentrations and connect them together in what I think I would prefer to call a pearl necklace district?

An answer to that is, if I were doing it, if I were hired as the expert in this case to draw the districts, I would feel obligated to try to go beyond the single black district that everyone has drawn in the Dade County area. I would feel obligated to go beyond that. Now, admittedly, when you go beyond that, you are going to create a district which is not pretty.

There's a trade-off in terms of the various values that we want to accomplish in districting. Compliance with the Voting Rights Act obviously is a very important value. Compact districts, because of the ease of administration, the ease of the understanding of the voters, for a number of reasons, are also an important value. Unfortunately, in this world, you cannot maximize all of the values, and so you have to make some trade-offs. If I were doing it, I would feel an obligation under the Voting Rights Act to [9] create a second, perhaps a third, black district. What do you do when you go beyond the single concentrations? What do you have to look for? Well, I would say, first of all, you have to look for a community of interest in those separate minority communities that you are joining together, and you have to say, is there a community of interest among those separate aggregations that you're putting together in your pearl necklace?

Q. And, Dr. Arrington, what do you mean by a "community of interest"? How do you define it?

A If you ask a half dozen of witwnesses that question, you will likely get about half a dozen different an-

swers. That is not an area, yet, that has been very carefully developed. What I would look for is a similarity in lifestyle. I would—especially when you are talking about congressional districts, I would look for similar attitudes on national issues, similar needs from the federal government as expressed in the attitudes and the desires of those communities. And, if you see those communities typically desiring the same kinds of things from the federal government, the same kinds of policies, then you have a clear, for congressional districting purposes, community of interest.

I would also want to look for whether they express their community of interest, their similarity of community of [10] interest, in terms of voting the same way for statewide or national offices. That's a good indicator, and an indicator that I have used in other cases, to tell me that desperate communities, communities that are separate geographically, actually have a community of interest.

For the Hispanic community in Florida this is particularly difficult because the Hispanic community is diverse both racially and in terms of nationality. That is not a homogeneous population.

In terms of the black community, I would make a very different argument. And I want to be careful here, because I don't want my good friends in this audience who are black to think that I'm saying all black people are alike. I'm not saying that. But there is a sense in which race is such an important factor in our society, is such a determinative, the way people live, their lifestyle, their chances in life, there is a sense in which black people almost always have some community of interest. And so it's easier to put together separated concentrations of black voters into a single district and to justify that than it would be, say, for Hispanics or for other minorities in other places.

The question of how many of these districts we should draw then is a very difficult one. It first of all involves

how many can you draw physically, and it involves the question that the Court, and only the Court can determine in [11] this case, how much of compactness, how much difficulty of administration of the districts, how much difficulty in campaigning in the districts will be sacrificed in order to draw additional minority districts?

The question the Court has to determine is how many they are allowed, that they think the law allows them to draw, how many should they draw, how many must they draw.

The only other question seems to me to be very much in evidence as a dispute in this case is the question what constitutes a minority district.

Would you like me to go into that?

Q I would like you to explain what, in your opinion, constitutes a minority district.

A The courts initially insisted that the minority district needs to be a super-majority—that is, it needed to be a 65 percent population—in order to assure that it's at least 60 percent voting age population district or black VAP or Hispanic VAP—"V-A-P" as we often say.

That has been modified somewhat, but I think it's also been distorted by a number of people over the course of some of these cases.

The Court has clearly said, it seems to me, that experts should rely on voting data and turnout data to determine whether a particular black district might be packed; that is, do you really need a 65 percent if you look carefully? [12] At turnout data and voting data, you may determine that a good reliable black district, for example, or a good reliable Hispanic district, does not require a 60 percent black VAP, but I do not believe it is reasonable to use what I call the algebraic formula approach to construct the district which is 30 percent black or 35 percent black, and then to pronounce that that's really a majority black district because some black has won there; or because, if you put in the right algebraic numbers, you can determine that a black could win.

The object of drawing black districts is to draw districts where blacks can control. That's what you want to do first, or Hispanics.

Q And, in your opinion, what is the minimum percentage that you need to have a black controlled district?

A The very word itself, majority district. It must be a majority of something. And, to me, that means the voting age population. And I would say an absolute minimum, no matter what the algebraic numbers come back to mean, that you need to draw a 50 percent plus VAP district. I'm uncomfortable really with that. I'd like to have higher numbers than those, but you have to be realistic about what's possible in each jurisdiction.

Q And what number do you start to feel comfortable for a black district to control?

[13] A I get real comfortable at 55 black VAP. When I get to 60, I begin to get uncomfortable, because at that point I begin to thing about packing. But, again, where packing occurs is something that I am comfortable in determining on the basis of historic knowledge of the black and white turnout and the typical black and white crossover vote. I'm not comfortable in determining that to see how low I can go, and I think that's an important distinction. And I know on one side of the room I'm getting some nods, and I want, if I can, to get some nods on the other side, by saying however—

(Laughter.)

MR. ZACK: We will start nodding, if that will make him feel better.

THE WITNESS: That does not mean that your responsibility, in my view, that your responsibility has ended when you have drawn as many black majority districts as you can. If in a particular area of the state it's not possible to draw a black majority district, but it is possible to concentrate the black population in order to draw a district in which blacks would be very influential,

then I think you have an obligation to do that. And, as I say, I got some nods on the other side of the room.

* * * *

[24] Q And, Dr. Arrington, I would like to summarize if there are other factors you feel this Court should consider in evaluating, not only the Common Cause plan, but also the other plans before it as it attempts to draw districts that will last for the last ten years.

A I think there are a couple of things. The first one is, in drawing the Hispanic district, you've got to remember the diversity in the Hispanic community in Florida, and you have to be very careful about how you combine neighborhoods in those Hispanic districts that may have very different kinds of Hispanics and may cause, if you don't draw the districts carefully, may cause you to draw a district in which, in fact, because the Hispanic community will not be cohesive, it will not be able to win that district, and you have to be very careful about that.

Secondly, I would say that we already know that to draw enough minority districts is going to require drawing some districts that are going to look very bad. They are going to be difficult to administer; they are going to be difficult for the public to understand. Because of that, it seems to me, it is ever more important that the other [25] districts, you see the other 18 or 19 districts, then need to be drawn very carefully to follow established lines in the state, to follow county boundaries where you can do that, to follow traditional boundaries, to be as regularly shaped as you can make them. So that, overall, the plan will make some sense, because you are going to have, what I call, pearl necklaces or what several attorneys have called buck splatters, you are going to have some of those evidently. So you need to be careful to make sure the rest of the districts are drawn carefully.

Then, when you've done that, you have to check those districts for partisan fairness. And if they are not fair, try to redraw them, if that's possible. But, again, that

may not be possible. Again, you were juggling all of those balls. The Court will simply have to suffice and do the best it can.

* * * *

[27] Q Dr. Arrington, my name is Brenda Wright, for the Humphrey intervenors.

You mentioned criteria that one applies in redistricting, and you said that the paramount criteria that you would consider was the Voting Rights Act first?

A Well, one person/one vote first, and then the Voting Rights Act, absolutely.

Q And then you also mentioned after that compactness, correct?

A Yes.

Q And would it be fair to assume that compactness comes down a little bit lower in that ranking because, unlike the [28] Voting Rights Act, there is no federal compactness act?

A That's correct.

Q Now, you mentioned that the obligations of someone drawing—

A Can I add something to that? I think, obviously, there is a federal regulation called the Voting Rights Act; but I also believe, just a matter of what is fair and just in redistricting, the point of drawing districts is to create a situation in which people are represented, and that includes represented in any way that they think is important. And you see tremendous cohesion in the voting of the black community and, to some extent, the Hispanic community. So, they are indicating to us that they want to be represented as such. So, I think there is an obligation there, even if the Voting Rights Act did not exist.

Q I understand. Now, you mentioned that the obligations of someone drawing a plan do not necessarily end when you have looked at the majority black or Hispanic voting age populations that you can draw, correct?

A That's correct.

Q And that would mean, would it not, that, if you were presented with a table, such as the one you see on that easel in front of you, a table that takes all of these plans and looks only at the majority black orHispanic voting age population district, and completely ignores the differences [29] in the plans in terms of less than 50 percent VAP district that they would draw, you don't have complete information that you need; is that correct?

A That's correct.

* * * *

[34] A Absolutely.

Q Were you here for the testimony of any of the folks in the Humphrey intervenor case; that would be Gwen Humphrey and Jack McLain, any of those people?

A I lose track of the players, since they don't numbers on their back, but I was here all day and I was here for the last hour, hour and a half yesterday.

Q You heard some of them talking about local needs and local desires, correct?

A Yes.

Q And you heard some of them talking about motivation and reasons and questions that they had, correct?

A Yes.

Q Those would all be ingredients, not necessarily the ingredient, but ingredients in devising a plan, would they not?

[35] A Certainly.

Q As I understood it—and correct, please, if I'm wrong—in the same way that I understood from Mr. Jones, while the Common Cause plan carefully preserves county and institutional boundaries—"institutional" being long time in history of Florida—it seems to me that certainly you were testifying that maybe, just maybe, the Common Cause plan might not achieve all the things we want to achieve in this particular litigation; is that correct?

A That's correct. In fact, I would not put in the "maybe."

Q It will not?

A It will not. We said that.

Q Now, it is your opinion, as I understand it, and you answered the question, do you believe clearly and firmly that there should be additional black minority—majority/minority district?

A I do.

* * * *

[40] Q Dr. Arrington, the answer to the last question was, in your opinion, you would try to draw three black districts?

A I would try to draw three.

Q Upon what facts was that number three based?

A Very simply, if you draw three, then out of 23, that's about 12 percent of the congressional delegation, which is about as close as you can get to the population of the state, which is about 13 percent black, proportionality.

Q Proportionality.

A See, what you are trying to do, according to the Voting Rights Act, is to equalize. You are trying to move to the direction of making the black community and the Hispanic community equal participants in the political process, taken as a whole, and equally able to choose candidates of their choice. When you get to proportionality, you come, in my view, pretty close to being equal at that point, and you say, "Okay, I have done what is my duty to do. I have done enough."

Q But you would agree, would you not, that proportionality is not a requirement of Section 2 to the Voting Rights Act?

[41] A That's correct, it is not a requirement of Section 2. However, I think sometimes we miss interpret that. It seems to me the intent of the—I believe it was the Dolan Amendment, which said that nothing in the act shall be interpreted to indicate proportional representation. The way that is really applies is the following:

A group cannot claim to have a Section 2 violation merely because they do not elect members of their group equal to proportionality. But it seems to me the reverse is not true. It seems to me that it's perfectly appropriate to say that when a group reaches proportionality, there is not a Section 2 violation.

Q Do you have any other personal knowledge of the distribution of the minority population in Florida to support your conclusion that three is the number to shoot for?

A No. I don't know that you can draw three districts that are acceptable. I'm only saying, the question was, how many should you try to draw, and if I were doing it, I would try to draw three. I might conclude that I could only draw two that seemed to me worth drawing, that seemed to me to put together communities of interest, that seemed to me would not unduly sacrifice other values.

Q Would you temper your aspiration to draw three based on the, quote, sufficiently large and geographical compact [42] requirement of *Gingles*?

A No. I think given the technology we have to today—you have to reember that *Gingles* was talking about what you do when you have an at-large situation. And the answer is, you divide them into districts. If blacks are sufficiently large within that jurisdiction, where you had at-large election, sufficiently large to constitute a majority.

When you apply that language to the situation that we're dealing with here, which is the situation where you've got a lot of districts, and you've always had a lot of the districts, that language doesn't quite fit anymore.

Q So, from your perspective, *Gingles* is not a constraint upon the power of the Court to determine the number of districts to be drawn?

A That's correct.

* * * *

[64] Q Dr. Arrington, my name is Perry Odom. I represent the Intervenor Plaintiff Andy Ireland. Isn't there a question on the census questionaire regarding country of origin?

A I think that only applies to people who were born outside the United States. There's a reason, and—I'm not an expert on the census, all right, but there's a reason why that's not very a handy piece of data about the Hispanics in South Florida. I think it has to do with they don't ask [65] that question of everyone, they ask it only of people who were born outside the United States.

Q Is there a question on there about what is their second language?

A I think there is a language question on there.

Q Wouldn't that be some kind of an indicator of the type of Hispanics?

A No, except for those who would say French and therefore you would know they were from Haiti. But, again, one of the reasons that the Hispanic community is diverse is that part of the Hispanic community is also black. And so you can tell that. So that part of the diversity can be told, but there are other divisions within the Hispanic community, and the point is that I can tell where those people are by the census.

* * * *

TESTIMONY OF DARIO MORENO

TR. VOL. III

* * * *

[292] Q Are you familiar generally with the electoral contest of Hispanic candidates in Dade County, State legislative or—

A Yes, I am.

Q When the plaintiff in this case, State Representative De Grandy, first ran for office, do you [293] recall that election?

A I have a vague recollection of it.

Q Do you recall that he, his first attempt was not successful?

A Yes, I do.

Q Do you recall what his party affiliation was when he first ran?

* * * *

TESTIMONY OF MIGUEL DE GRANDY

TR. VOL. IV

* * * *

[49] Q Isn't it correct that there is a county bordering Dade County which has an Hispanic population?

[50] A There are Hispanics everywhere in Florida.

Q Talking specifically of the county immediately west of Dade, which our House district captures?

A Collier County has Hispanic citizens, yes.

Q Yes. That's a Section 5 county, isn't it?

A That's correct.

Q With Hispanic population?

A That's correct.

Q And in fact it is a Section 5 county because of the Hispanic population, isn't it?

A I believe so.

Q Isn't it correct that—isn't it correct that Cuban-Americans as opposed to the general other Hispanic populations in Florida are generally Republicans?

A No, sir. As a matter of fact in Dade County I looked up the—the records from the Department of Elections, and with exception of the Puerto Rican community, which is 40 percent Republican and 50 percent Democrat, every other group is more Republican than Democrat. That is those Nicarauguans, that is those Colombians, that

is all of those Central and South Americans, Hispanics are more Republican than they are Democrat, with the exception of the Puerto Rican community.

Q And your testimony is that the Hispanic population in Dade County is more Republican than Democrat?

A That is correct, according to the Dade County Department [51] of Elections data that I received from the supervisor of elections.

Q Return, if you know, to the thematic coding of these maps, which you don't know what they were drawn on. What—what is the significance of the color?

A Well, the colors show, one, where the Hispanic populations are, and by the difference in the shading it shows the percentage of concentration.

Q So the thematic is key to the concentration as opposed to the number? I mean, I could have a—have a concentration—what is a high concentration on the thematic? Is that dark brown?

A If you start at the first page of the exhibit that is not numbered, actually the—the last page before you get to page No. 1, that gives you the color code key.

Q And the scale is 30, 35, 40, 60 and a hundred. Do you know why that scale was used, those numbers?

A No, sir.

Q But for the Hispanic population, this more brilliant red indicates the denser concentration of the Hispanics?

A Yes, sir.

Q And I would find, for example, a very small pocket of Hispanics in Glades County, it doesn't show brilliant red on this map, although the number may be, in fact, relatively small, is that correct?

[52] A That's correct.

Q Would you agree that—that perhaps this booklet is a bit misleading in terms of these showings of brilliant colors, given that scale, when in fact the actual numbers are not depicted?

A I wouldn't say they were misleading. What we did, for example, when we used the thematics in the

House map, once you get your color concentration, you would ask the computer the population number and area so that you know what you are putting into constructing each district. They accurately reflect the concentrations, although, as you correctly stated, do not tend to reflect the actual number of people that live in that selected area.

Q This book gives the first part of the question, but as Paul Harvey would say, where is the rest of the story which this book doesn't depict?

A It does not reflect actual numbers of Hispanics, no.

MR. PETERS: Thank you.

I said I would be short. Brief, Judge.

THE COURT: Mr. Burr, are you now ready?

MR. BURR: Yes, sir, Your Honor.

(Discussion off the record)

CROSS-EXAMINATION

BY MR. BURR:

Q Representative De Grandy, what are the Hispanic voting age [53] populations in your District No. 18 and your District No. 21?

A If I can look at the chart?

Q Yes, please.

(Pause)

MR. GERBER: Can you see it here?

THE WITNESS: Uh-huh.

A The voting age populations on District 18, 67.5, and District 21, 70.6.

Q Would you characterize those two percentages as constituting supermajority districts, as that term has been used in the courtroom over the last two and a half days?

A Yes.

Q All right. Was that an important goal that you and the people who you worked with on drawing Plan 212 to have for the two Hispanic districts in Dade County?

A Yes, sir.

Q All right. Explain to me why that was important to you.

A Well, several factors. The most significant of which are—is that there are a lot of Hispanics—Hispanic residents in Dade County as throughout the state that are not citizens and are therefore not registered to vote. And also the fact that at least in the data we had seen there was a low votnig turnout in the Hispanic community.

Q Were you present yesterday during the evening testimony of Dr. Arrington?

[54] A No, sir, I was not.

Q Well, do you believe that it is important to the Hispanics in Dade County to have a supermajority district for the additional reason, that it is important to you as a community to be able to elect the candidates of your choice without having to in effect go to the Anglo power structure in Miami and get their stamp of approval on your candidates?

A Oh, absolutely. We found that—in our experience that there is a lot of polarized voting in Dade County. You can't really go to an Anglo community or to African-American communities and build successful coalitions in that respect.

Q So it is important to you for the Hispanics to be able to do whatever it is they want to do, pursue their goals without having to go to extraordinary length to build shifting and uncertain alliances with other people?

A Yes. It's been my personal experience that the only way the Hispanic community can elect a candidate of their choice is to have a supermajority district.

* * * *

[60] Q Have you heard the testimony given previously in this courtroom the last two and a half days about the

extent of racial polarization and racial bloc voting both from Dr. Stern, Dr. Arrington and various of the other expert witnesses?

A I have observed some of the testimony and I have lived in Dade County.

Q You believe it exists? You know it exists.

A I know it exists. I would also tell you that in even the most polarized election you will get 15, 20 percent, 25 percent crossover vote anyway of more enlightened people that are not prone to racial politics.

[61] Q Representative De Grandy, what did the Dade County branch of the NAACP ask for in terms of black voting age population for the districts that were being drawn in Dade County?

A Voting age population?

Q Yes, sir?

A I don't have a specific recollection. I can tell you that they asked for a majority of black districts, and may very well have asked for over 50 percent of voting age population.

Q Isn't it true, Representative De Grandy, that what you have set out to do is draw the maximum number of districts possible for blacks that gave the superficial appearance of allowing blacks to be elected in those districts?

MR. RUMBERGER: (Indicating)

MR. BURR: I know you don't like the question, but it's properly phrased and it's a fair question, and I would appreciate it if you would let me finish it.

MR. RUMBERGER: Finish your question. I will make the objection.

Don't answer.

BY MR. BURR:

Q Isn't it a fact that you have attempted to draw districts that had the appearance of electability but in fact do not provide electability, and you did so with ulterior motives?

MR. RUMBERGER: Argumentive, speechifying and repetitive.

[62] THE COURT: Overruled.

A No, sir, there were no ulterior motives. As a matter of fact, the Hispanic Caucus of the House of Representatives is very well on record to the extent that we have had to go against our own party. We were more concerned with minority representation. We think the more African-Americans elected to office, the better the Hispanic community will be because there is a significant commonality of interests when it comes to health care, education, when it comes to civil rights legislation and other matters that I think we believe by having African-American representation and the African-American community benefit by having Hispanic representation.

[76] Q Sir, isn't it true that the 20 percent crossover voting that you say exists for any candidate, you were not willing to apply to the Hispanic community to bring down that 65 percent number to 45 percent, isn't that correct?

A I think necessarily it needs to be applied. As I testified, the difference between the African-American districts and Hispanic districts is the high percentage of noncitizens. Therefore your VAP number on Hispanic districts is not reflective as the African-American VAP may be reflected. If we factor that out, we are probably running 45, 46 percent VAP districts in the Hispanic districts that we've drawn.

[77] Q You are saying that a 45 percent VAP Hispanic district will perform for Hispanic where you drew it, is that correct?

A Sir, that's what you just said. What I just said was that you needed supermajority districts to account for the fact that there is a high number of noncitizens and therefore people that cannot vote. You can put them in a VAP number but they are not accurately reflective of those that can vote because they have the disadvantage of not being citizens. Once you factor those people out, you would probably have, of those registered to vote,

those available to vote, those that are citizens, probably the same VIP—VAP that you have in the African-American communities that we drew.

Q I am asking you a simple question. How many VAP Hispanics do you need to have a controlled district, 47 or 67? You keep changing, sir.

A You need approximately over 65 persons to account for those who are noncitizens.

Q And as far as crossover voting is concerned, the ten percent, 15 percent crossover is washed out by the fact that no group, no matter how cohesive, votes a hundred percent. There is also a 15 percent slack-off even in the most cohesive group, isn't tht correct, sir?

* * * *

[92] Q And how do you define a Cuban or a Hispanic? Is it a person by origin?

A I consider Hispanic basically people that are language minorities and that are of Spanish heritage.

Q And heritage means their father and mother were Hispanic?

A It could mean that you were born and bred in that country, came to this country. It could mean that your parents are Hispanic. That's a definition for the Court to make.

Q And if your parents are Hispanic, both Cubans, and you are born in this country, you are considered Hispanic; is that correct?

A It depends on what definition you're using.

Q By the census.

A The census is self-determination, basically: If you consider yourself Hispanic, because of that, you are.

Q And I would be Hispanic under that definition having a Cuban mother and an American father and living in Cuba until I was 14; right?

A I would guess if you blocked the box that said "Hispanic," you would be considered Hispanic.

Q So, the determination of who is going to vote for who based on Hispanic—matter of fact, the Dade County

Registrar keeps it differently, though. She says if you were born in the United States, that that's the only issue; isn't that correct?

[93] A That's basically correct. The Dade County Department of Elections Classifies Hispanics only those persons born outside the United States.

Q So, there's a great deal of subjectivity in determining who is going to vote for who during the course of any election; isn't that right?

A As to who is going to vote for who?

Q Yes.

A Yes, it's an individual matter.

Q It's not a science; it's an art form of determining elections. That's why you have pollsters and that's why you have political consultants and so forth; right?

* * * *

[106] Q As the Cuban population becomes naturalized, those that are not citizens, they become very active in voting as well; isn't that correct, sir?

A I would say they participate, yes.

Q And, sir, there are more Cuban Hispanics migrating to Dade County than there are blacks? The effective migration rate is greater for Hispanics; isn't that correct?

[107] A It would be reasonable to conclude that.

Q And finally, sir, in the last ten years, whenever there is disruption in South America, you have a new wave of migration of Hispanics to the Miami area, ultimately become citizens. Have you put that possibility in your equation in answering the Judge's question?

A Yes, sir. I disagree with some of the premise of your question that they become citizens. A lot of them do not and that's the problem that we have in crafting these districts. But, yes, I have taken that into account. As a matter of fact, the data and analysis that I have seen show that those Hispanic individuals concentrate and congregate in the Hispanic areas that exist today. They do not move into the African American communities.

Q Have you seen the articles that talk about the wave of Cuban migration to the United States when Castro, one day hopefully, falls?

A Yes, sir; I have seen literature that showed that there will be a cross over; there will be many Cuban Americans going back to the island and many migrating here. And it is expected to level off and equal out.

Q Isn't it true that all those surveys show the same thing, that you have the older Hispanics who are not registered, who are not active, going back to Cuba, but the young Cubans coming into the United States, who in all probability will register [108] and become citizens and, again, increase the Hispanic population in Dade County?

A I would disagree with the premise of your question. As a matter of fact, the older Cuban Americans are the ones that are more active voters than the people, unfortunately, in my generation.

* * * *

* * * *

TESTIMONY OF DARIO MORENO

TR VOL. IV

* * * *

[281] A Yes. In most of the scholarly work done on the Hispanic group—and I refer to the work of Alexandra Portez of Johns Hopkins University, and Ms. Sandra Perez, director of the Cuban Research Institute at Florida International University. These scholars speak in terms of the Hispanic community of Miami as an enclave, as an ethnic enclave. What they mean by this is that this is a community in which people can perform all the basic functions of daily life—banking, seeing a lawyer—

Q We like that.

A —medicine, dentistry, schooling—without any contact with the dominant—with the dominant culture. So this Hispanic enclave in my mind represents the—should

be preserved in order to maintain the community of interest of the Hispanic population of Dade County.

* * * *

[284] Q Now, Dr. Moreno, at our request, did you make a study or a determination or obtain information which will be useful to the Court in determining the impact of future population fluctuations on these two Hispanic districts in South Florida?

A I didn't do a study, but I think I can make the following observation—

MR. ZACK: He didn't make a study, but he is going to make observations. Is that what he said?

[285] MR. RUMBERGER: Yes.

MR. ZACK: I object to somebody who observes without making a study of it.

THE COURT: Overruled. That goes to the weight.

THE WITNESS: In the 1960s, seventies and eighties, the Hispanic population of Dade County has basically been held hostage to political events in the Caribbean. The revolution in Nicaragua brought in—the census said 79,000 Nicaraguans. The correct figure, if you add the aliens to it that didn't file census for obvious reasons, is probably closer to a hundred thousand. The Mariel boat lift added 125,000 Cubans to the Dade County population. Political unrest in Colombia, Peru, Venezuela added about 75,000 other South Americans and Central Americans. So any projections of population growth in Dade County is very, very difficult.

However, we can say the following: That if you look at the settlement patterns of the Hispanics who arrived in the 1980s and in the 1970s, they tend to follow a pattern of settling in the old traditional Hispanic neighborhoods. In fact, the 1990 census revealed that a good portion of the poor, of the newly immigrant poor, who settled in Dade County settled in the East Little Havana area of Dade County. What happens is that the present Hispanic population in those areas then moved into either the West [286] Kendall area, wealthier Hispanics moved into Coral Gables or the central section of Miami Beach. And, in fact, the two fastest growing Hispanic populations in Dade are occurring in the Kendall area in West Dade, plus the significant growth in Coral Gables and in the Miami Beach area.

Q Is the Hispanic population in Kendall significant at the present time?

A It is extremely significant.

Q And you expect it to grow over the next ten years?

A If we look at current settlement patterns, it will probably continue into the 1990s, being the fastest growing area within Dade of Hispanic population.

* * * *

[289] Q Dr. Moreno, in your report where you express a concern that the Hispanic community be able to elect candidate of choice and participate in the political process without having to make an alliance with nonHispanic members of the community, you are very concerned about the percentage of the voting age population. Is that a fair statement?

A I think that is a fair statement.

Q Were you present during the testimony of Mr. Webster today?

A Yes, I was.

Q So, it is fair to say that you would disagree very strongly with Representative Webster's notion that voting age population is really not that important; it's on a scale with everything else?

A I will answer your question this way: I think the voting age population in the formation of congressional districts is of vital importance.

* * * *

[299] Q In doing your analysis for the plaintiffs, did you do any racial bloc voting or—

A Yes, I did. I did homogeneous precinct analysis.

Q Why just that?

A The reason are twofold: First, when you do homogeneous bloc analysis in Dade County, you are only dealing with 41 Hispanic precincts and about 51 black precincts. Moreover, when you do the more fancy regression analysis, the figures don't change. In fact, what they tend to do is become more extreme. You know, in some of the races, I did a couple of tables on racial bloc voting, and what happens is, when you do regression analysis, sometimes you get a hundred percent, and I just don't believe that, you know. And so I think homogeneous analysis, precinct analysis, is a much better way.

Q You define your precinct as one with 85 percent black, 85 percent non, 70 percent Hispanic; is that right?

A Right. And the reason for the lower Hispanic is, as you know, Dade County registrar only counts Hispanics those Hispanics born outside of the United States and those born [300] in Puerto Rico. Even though I was born in Havana, my little precinct card says I'm white. So the registration figures, you can probably add the 70 percent Hispanic precincts are probably also 85 percent.

Q Isn't it the general practice of persons doing that to use something more along the lines of a 90 percent precinct?

A The problem becomes, because of the way Dade County registrar of voters count Hispanics, they undercount them. So you don't have 90 percent precincts in Dade.

Moreover, I set the standards, you know, going back when I took that course, it was 70 percent is fine. The higher it gets is better, of course, but 70 percent is considered fine. Also you look—

Q Not better but fine?

A Well, I mean, obviously, 90 percent is better than 70 percent. But you are not going to get 90 percent Hispanic precinct because of the registrar of voters in Dade County counts Hispanics.

Q You say they don't exist in Dade County or—

A You can't get it. They don't—Mario Diaz, the lawyer, is counted as a white.

Q Yes, sir.

A I mean, so you are not going to get those.

Q With reference to the voting patterns in Dade County, your report indicates that you would agree with the [301] proposition that there is bloc voting by nonblacks and whites and blacks against Hispanics?

A Yes.

Q Would it make sense—given that kind of a bloc voting, what would be the preferred combination of population groups into a district? Would you put blacks into a Hispanic district? Would that not dilute their ability to—

A Yeah, I mean, of course. If you put Hispanics into black districts and blacks into Hispanic districts, you dilute their ability. But you have a geographic problem in Dade.

Q Yes, sir.

A And the geographic problem is that the Cuban enclave, which I described, basically goes from east to west, right? The black population of Dade County goes from north to south.

Q Yes, sir.

A So, at one point you are going to have intersection, if you are going to create solely Dade precincts. So, you're going to get a—so you are going to, if you want to create Dade-only precincts, you are going to get mixed with blacks. Also it's very important, there is a fracture zone. For example, in the Windwood area, the area around Biscayne, where you have a mixture of blacks, Hispanics, and nonHispanic whites, and, you know—

[302] Q It would help to mix them up, though?

A Yeah. Bascilly, if you—I assume you have been to Miami. Between the McCarthur Causeway and the Julianne Tunnel Causeway, you have some high-rises along Biscayne Boulevard. NonHispanic whites, wealthier Hispanics live in those high-rises. Then you have black neighborhood around them. So in those precincts you are going to get a mixture.

Q You would agree, would you not, that ideally to avoid diluting black voting strength, given the composition in Dade County anyway, it would be preferable to put blacks into a white district rather than an Hispanic district. Is that not correct? Your report is, the pattern of block voting by nonLatin whites against Hispanics is found in elections in all parts.

A Yeah, but the problem—it will be preferable, but you have a geographic problem of the mixture in some areas of Hispanics and blacks in the same precincts, so you are going to get a number of Hispaics in black districts, a number of blacks in Hispanic districts.

* * * *

[322] Now, sir, as the alien citizens becomes naturalized, you would expect them to vote, would you not, sir?

A Yes.

Q And, as a matter of fact, as the citizens have become naturalized they have registered in overwhelming numbers; isn't that correct, the Hispanic citizens?

A Yes.

* * * *

TESTIMONY OF LISA HANDLEY

TR VOL. VI

* * * *

[224] Q Well, isn't racial bloc voting—don't Hispanics generally pretty much vote as a group?

A Hispanics are far less cohesive than blacks, but the majority of Hispanics tend to vote for Hispanics.

* * * *

TESTIMONY OF RONALD WEBER

TR VOL. VII

* * * *

[20] Q What is the importance of VAP majority, sir?

A Basically my understanding is that in order for the minority group in question, be that black or African-

American, minority group or Hispanic, in order for them to be able to effectively control the outcome of an election in the district, they need to have a majority VAP in the district.

Q All right, sir. What is importance of registered—of the registration figure on that chart?

A That provides an additional piece of information that Florida is fortunate to be able to provide. Not all states [21] can do this. Basically it says for the same configuration of population is that majority voting age population in fact registered, such that there is also a majority of registrants. You will notice that in the table as far as all of the black or African-American districts there is in fact a registration majority in each of these districts.

Q Sir, how would you evaluate a district to determine whether it provides a fair and reasonable opportunity for both black and Hispanic voters to elect a candidate of their choice?

A You need to start first of all with voting age population and registration figures. That's the basis which you start from. Then you also should have some knowledge or learn something about turnout in the proposed district and then assess whether or not there are differences across the various groups, black, white, Hispanic so on, in the various proposed districts to determine whether or not there is a turnout in majority.

Once you've done that, you can geenrally add that to perhaps some information that you might have about electoral history and to be able to come to a reasonable understanding of the possibility that that district will perform.

* * * *

TESTIMONY OF SUSAN McMANUS

TR VOL. VIII

* * * *

[27] Q Have you done what was requested by the court to look at demographic trends among black and Hispanic voters?

A Yes.

Q And is that contained in Table No. 11?

A Yes.

Q And would you tell the court what Table No. 11 reveals to you and to us?

[28] A Well, what this table shows is that you have some very important dynamics in terms of racial composition trends—racial and ethnic competition—composition trends occurring in South Florida. And I just picked the counties that are in many of the South Florida plans that are districts designed for minorities. And you can clearly see here that in most of these South Florida counties you have a trend whereby the black population growth rate has—is declining and Hispanic growth rate is increasing.

Q Let's take Dade County. What is the change—well, let's—what is the change in Dade County comparing the black percentages to the Hispanic percentages as estimated by your reports?

A These reports, of course—

Q I would like the court to have identified first this chart which is Hispanic and Population Trends, as the court can see, which is the red and which is the black—is it blue? Blue?

Q Will you tell the court what those lines are and who they are reflecting?

A Okay. I'm sorry, I was still on the last table. If I can, I will change from my comments.

Q Okay.

A Last table was based, of course, on U.S. Bureau of the Census statistics for 1980 and 1990.

The chart that you're referring to, exhibit, excuse [29] me. What was the exhibit number?

Q We are going to mark that. We don't have small ones of that. So it will be the next numbered exhibit.

THE CLERK: Senate's 39.

THE COURT: Thirty-nine.

MR. ZACK: Judge, I figured everybody could see it, it was large enough.

THE COURT: Can everybody see it?

BY MR. ZACK:

Q All right. Would you tell the court what that shows?

A This is a chart that was prepared by the Metro-Dade County Planning Department Research Division in 1987. At that time it showed it—it is a trend line projection going to 1950 from the year 2,000. And it clearly shows that the slope of the growth rate in Hispanic population is markedly steeper than the slope of the black population growth rate.

Subsequent to this, preparing for for this presentation, I did contact the Metro-Dade County Planning Department to ask them if they had a more current chart based upon the 1990 census figures and a more current projection chart, at which time the director of that division told me that they did not have that yet but he could definitively say, and he strongly underlined the word "definitively," that this projetcion line—that these projection lines would be even steeper for Hispanics and flatter for blacks in Dade County. [30] And that would be through the next decade.

Q And betwen 1980 and 1990 in Dade County, the black population went up 3.2 percent and the Hispanic population went up to 13.5 percent, if you look at your Table No. 11, is that correct?

A That is correct.

Q And they expect that to continue and have even a more significant disparity between the three groups into the future?

A Yes.

* * * *

TESTIMONY OF DAVID GELFAND

TR VOL. XI

* * * *

[24] Q A majority/minority district does not have to be composed solely of blacks or Hispauics, is that correct?

A No, it does not. However, in this particular case, there was substantial testimony that at least in South Florida there was not as much overlap in the voting patterns of blacks and Hispanics. Indeed some testimony was to the effect that the polarization between blacks and Hispanics in South Florida was even more extreme than the polarization between Anglos and whites, and blacks and whites. And for that reason, I have not stressed in the report or in my brief presentation here that some of these districts, for example, in Central Florida, have reasonable numbers of both blacks and Hispanics.

If one were conducting this in Texas or in some other states where there was not that degree of polarization, perhaps that would be a more important point. [25] But I did not stress it here, particularly for South Florida, based on some of the testimony from your case, Mr. Rumberger.

Q I guess the answer is no?

A I said no in the beginning and I say no again, but I was trying to provide an explanation.

* * * *

[72] Q Professor Gelfand, just a couple of questions my associate called to my attention I should be asking—I should have asked and did not—in connection with the South Florida district.

A Yes, sir.

Q I'm assuming you accepted the testimony or at least in part accepted the testimony of Dr. Dario Moreno

concerning the community of interest and the need that the Hispanic/Spanish community has in South Florida for these districts; is that correct?

A Yes, sir.

Q And would you tell us, please, simply what went into your making of those districts as opposed, say, to the districts suggested by the Margolis plan which ran out into Hendry, Collier, et cetera?

A Yes, sir. Well, the testimony, as you know, was pretty clear about the sub-groups of Hispanics. And the Margolis paln and a few others tend to combine Cubans with other Hispanics, Puerto Ricans and Nicaraguans, that did not have the same community of interest and not necessarily the same voting pattern. And, indeed, there were some electoral studies that [73] we had the House run to confirm that.

Q And also if those districts were in fact drawn and drew them in or maintained in subsequent proceedings, it does require complaint of compact two areas essentially; is that correct?

A Yes, sir.

Q It doesn't require traveling any distance to achieve the requisite numbers of VAP in light of the Spanish district?

* * * *

[76] Q "A super majority of the VAP is required for an Hispanic district to be effective, due to the large number of non-citizens and generally lower registration rates among Hispanics in Florida;" is that correct?

A I do state that; yes, sir.

Q And you then state in the first sentence of Paragraph 9, same page, "The State of Florida has a history of legally enforced racial discrimination;" correct?

A That was stipulated to; yes, sir.

Q And it was not stipulated to, but for the purposes of our continuation, I'll just say that's what you said in your report. And Paragraph 10, which is, "This history of discrimination is reflected in the phenomenon of

racially polarized voting." Did you find that as well as a finding of your own?

A Yes, sir; from the record, yes.

Q What caused you to have a finding of racially polarized voting in District No. 23, which I will refer to at all times as your influence district, which is white on your map. Okay? Would you answer that question, please?

A Oh, well, do I agree that District No. 23 is white on my map and that you are going to call it my influence district? Yes; I agree with that.

* * * *

[118] Q What criteria did you use other than VAP in determining if districts are indeed effective?

A VAP was the principal focus as explained in quite a bit of testimony, in particular, Dr. Arrington's testimony and others as well. And, indeed, as I appreciated most of the record and most of the debate—we have more than 2,000 pages of transcript here, total of ten volumes —but a handful of things that are in common: Virtually all of the experts focused on the VAP as a very useful measure in determining effectiveness of a particular district.

Q And yes or no question: Your prediction of a performance of a district you're tending to this Court is based upon VAP [119] numbers alone? Is that yes or no?

A No.

MR. ODOM: Objection, Your Honor, asked and answered.

BY MR. PETERS:

Q I'm sorry; if you would answer.

THE COURT: Overruled.

BY MR. PETERS:

Q I didn't hear your answer.

A No.

Q If it is not based upon VAP alone, where in your report is there any discussion of that alternative basis? I didn't see it, sir.

A You mean additional basis?

Q Yes.

A It was the principal basis, as it was for most of the parties. Other factors were communities of interest. And when there was evidence about polarized voting on particular districts or particular elections or particular areas, there was quite a lot of testimony by different sides about that. It was mixed and balanced, in fact; there was some disagreement about that, of course, as you know.

Q So, the numerical basis for your prediction performance is VAP but you're saying the qualitative analysis based upon community of interest which is discussed in your report; is that what you are saying?

[120] A There are qualitative factors. There are also other quantitative factors besides VAP, as Dr. Arrington explained, help you feel more secure in using VAP, like some of the four black races that were run by several of the experts.

* * * *

EXCERPTS FROM THE TRIAL TRANSCRIPTS
6/29/92-7/1/92

UNITED STATES OPENING STATEMENT

TR VOL. I

* * * *

[42] Now, with regard to the specific questions about what are we complaining about. If I may resort very briefly to—and you asked me to try to be district specific, which I think is—

JUDGE HATCHETT: Yes.

MR. HERBERT: —which I think is the way these cases really should proceed, is to outline for you—and we can do this in one or two ways in my proffer. Dr. Moreno can actually stand with me, and he would be one of the principal people testifying about Dade County, and I can actually have him, because he is from Miami, explain to you the district numbers as well as how the contour of these [43] lines fragment the Hispanic population. I can —I can show you exactly, though, on my own at this point, and I know my counsel over there probably won't be able to see it very well, unless they want to come up.

This is a map. I will move that easel back, Judge Stafford. This is a map of the South Dade County area, as proposed by the state in the Senate plan. This is the state's proposed plan, as it is currently before the Court and which we challenge under the Voting Rights Act.

JUDGE VINSON: What is now the state plan.

MR. HEBERT: What is now the state plan. Thank you, Your Honor.

The district—if Dr. Moreno could at least come up and make sure—if you wouldn't mind just standing along side of me and helping me walk through it.

JUDGE HATCHETT: It will save a lot of time if we go through this now.

MR. HEBERT: Okay. This purple district, Dr. Moreno, if you could just very briefly explain the racial

composition of this district—and, by the way, let me just outline it for you.

JUDGE HATCHETT: Well, I don't know if we want him to testify at this point.

MR. HEBERT: Okay. I can go ahead—

JUDGE HATCHETT: The question is: Are you going to [44] be able to show a geographically compact area that could be formed into a majority district. Are you going to be able to do that?

MR. HEBERT: Yes, we are.

JUDGE HATCHETT: That's all we need to know at this time.

MR. HEBERT: And if I may just take it one very brief step further, this district, as drawn by the state, to protect an Anglo incumbent and fragments the Hispanic population, actually goes up into here—and by "here," I'm pointing kind of the Miami Beach area—

DR. MORENO: Liberty City.

MR. HEBERT: —Liberty City, comes down is like this. And we believe that it is drawing districts like this on the Senate side that then prevent the fair line drawing process from taking place, which would result in an additional district for Hispanics in the Dade County area.

JUDGE HATCHETT: How many districts?

MR. HEBERT: There are three districts under the state's plan, and we believe that a fairly drawn plan, and there is an alternative plan before this Court for this area on the Senate side, you would have four districts.

JUDGE VINSON: Hispanic districts?

MR. HEBERT: Four Hispanic majority districts, correct.

* * * *

[45] MR. HEBERT: No, we are not, the United States—

JUDGE VINSON: All right. You are going to tell us what the percentages are. Go ahead.

MR. HEBERT: The Senate plan—the voting age population of districts under the Senate plan that contain

sizeable concentrations of Hispanics are 76.1, 66.3, 64.3, 33.1, 29.9.

* * * *

DE GRANDY PLAINTIFFS' OPENING STATEMENT

TR. VOL. I

* * * *

[49] MR. HERBERT: They are separate districts, correct. As I said, what we tried to do—"we" the plaintiffs, and I'm really speaking for all of us, although I probably shouldn't, but we tried to get together and marshall our evidence here, so that we all won't be taking up the Court's time, and we all know nobody's time is more valuable than the Court's time. But we tried to draw a plan that was fairly consistent as much as we could, at least insofar some of these districts go, if we want this Court on an [50] expedited basis to put this plan or some alternate plan into effect for 1992, I feel the plan has to, to the extent possible, do the least amount of disruption, but still protect minority voting strengths.

So that's why there are some districts that may look very similar. To the extent that it could be, some of these districts used the state's plan as a building block.

This is the Reaves, Brown plan, and if I may, this will be harder to see because we don't get quite—we are more up in the space shuttle here looking down at this district. This is the Miami area here, and they have a district, and again you can't see the yellow in here, because we're not down close enough, but this district and this district is connected by geography that is all part of one district, this yellow district. Their district is similar in that way.

All of these districts that are proposed by De Grandy and Reaves, Brown plaintiffs, they do indicate that, based on past election results, that these districts will likely result in Hispanic voters electing a candidate of their choice to the State Senate.

And that really is the difference on the Senate side in the Dade County area. And that really, from the Department of Justice's point of view, is really the focus of what we would like to put on as far as Section 2 evidence [51] on the Senate side.

I don't know if there's anybody else who wants to get into any other \parts of the state other than Dade County, or if you have any other questions on the Dade area, but that's our case on the Dade side.

MR. MEROS: Your Honor, that's our focus on the plaintiffs' side with the Senate as well.

JUDGE HATCHETT: All right.

MR. HEBERT: At the very end of my presentation, I would like to give you some estimate of how much time I think it would take to put on our case with live witnesses, but if you're.

JUDGE HATCHETT: We will hear that now.

MR. HEBERT: You'll hear that now?

JUDGE HATCHETT: Yes.

MR. HEBERT: Okay. We believe that we can call approximately maybe a half dozen witnesses, maybe as many as eight, if we have that many—legislators, I know they are in session; it may be hard to get people here. And I would think we can probably put on the entire case—you're hold two, but I don't know if that means two hours or two days.

JUDGE HATCHETT: Why don't we stop and have a conference with counsel?

MR. HEBERT: Could I consult with them for a minute? We haven't actually talked about this.

[52] JUDGE HATCHETT: Yes, talk to them before you make that representation.

(Pause.)

MR. HEBERT: Your Honor—

JUDGE HATCHETT: Yes.

* * * *

[103] MR. MEROS: Yes, sir. I can tell you precisely. We assert, as we have before, two districts in Dade County, two districts that were not drawn. We've discussed that before.

We intend to produce testimony concerning the Alachua/Marion County area, the Putnam—Alachua, Putnam and Marion County areas. We intend to introduce evidence

* * * *

[105] JUDGE HATCHETT: All right. Well, we can take care of that. It is this Court's understanding that we are no longer talking about influence districts; that if you show an influence district, your proof fails.

MR. MEROS: Your Honor, what I would propose to show in testimony is a district that will elect a candidate of choice even without majority VAP, voting age population. Gingles does not represent that you cannot have a minority district with a voting age population of less than 50 percent [106] if the facts show that that district will—the minority representation in that district will elect a candidate of choice.

JUDGE HATCHETT: Well, we may be able to save a little time and let the Court talk a little.

(Pause)

JUDGE HATCHETT: Just a minute, Mr. Crowley, we need to do our own research.

(Pause)

JUDGE HATCHETT: All right. We'll come back and let Mr. Meros come back for a minute, Mr. Crowley. And in an effort to save us time at the end of this case, I'm referring now to the 11th Circuit Case of Concerned Citizens of Hardee County versus Hardee County Board of Commissioners. The citation of that case is 906 Fed 2nd 524. Reading from that case: "First, the class must demonstrate that it is sufficiently large and geographically

compact to constitute a majority in a single member district." And that's quoting Gingles.

MR. MEROS: A majority.

JUDGE HATCHETT: A majority.

MR. MEROS: These districts I'm talking about are majority population, not majority—and some of them are majority voting age population. Others are only majority total population.

* * * *

[110] MR. ZACK: As I understand it, the only two parties that intervened at all as to the Senate, other than De Grandy, I heard Escambia as to the rest of them; I want to be clear about that.

JUDGE HATCHETT: That's correct.

MR. ZACK: The other thing is the law of the case, I would again cite to the Court, is on Page 16 of your opinion, where this Court stated that in analyzing the racial fairness [111] factor, the voting age population is the relevant number to be used in determining whether majority in a particular district will be able to elect a candidate of their choice; Solomon versus Liberty City, en banc cert denied, U.S. Supreme Court. And I just—I understand that is—from what I believe I heard the Court say, that has continued to be the law of the case in this matter.

JUDGE HATCHETT: That is the Court's impression of the law until the plaintiffs change that impression by some other law. After they put on their evidence, we'll argue about geographically compact and all of those factors, but we simply wanted the plaintiffs to know that that may be something that they'll be facing.

U.S. ARGUMENT OPPOSING THE SENATE'S MOTION FOR DIRECTED VERDICT

TR. VOL. III

* * * *

[193] MR. HEBERT: May it please the Court: I speak today in opposition of the State's motion. What we have established thus far with respect to the Senate plan are the three prerequisites set forth in Gingles. We have at least established enough to shift the burden now to the State with respect to the Senate plan by establishing a prima facie case of vote dilution against Hispanic voters in the Dade County area. How have we done it?

* * * *

DISCUSSION OF SECTION 5 ISSUES

TR. VOL. I

* * * *

[23] JUDGE HATCHETT: Well, yes, our previous ruling moots that issue, so the—your motion to quash is denied.

MR. CROWLEY: Granted?

JUDGE HATCHETT: I'm sorry. Granted. The issue is moot at this point, in light of our ruling.

MR. CROWLEY: Thank you.

MR. ZACK: On behalf of the Senate as well, Your Honor?

JUDGE HATCHETT: Yes.

All right. That takes care of those. I think that's all.

(Discussion off the record)

JUDGE HATCHETT: Defendants' Margolis and Gordon's motion to strike. Is that still a life issue?

MR. ZACK: Your Honor, that was the motion that we filed to narrow the scope of the proceedings to the Section 5 issue. I presume that you are going to deal with that in some of the other matters. You may want

to defer that or take it up now. I believe this court's ruling on several other pending motions will address that issue, or part of it.

JUDGE HATCHETT: Yes, we are going to take that up next. For the time being, for the record, that motion is denied, but we are going to discuss Section 5 and what happens now that the Supreme Court of Florida has ruled.

* * * *

[25] (Laughter)

JUDGE VINSON: Mr. Hebert?

MR. HEBERT: Good morning.

JUDGE HATCHETT: Good morning.

MR. HEBERT: With regard to the Section 5 issues and the plan adopted yesterday by the Florida Supreme Court. Let me start at the outset just by noting that when we objected to the Senate plan, our objection, as you know, focused on the Hillsborough County area. And we did not tell the state in that letter how it should go about correcting the dilution of the black voting strength that we found existing in the state's plan. We left that decision, as it properly belongs, in the hands of the State of Florida. The state legislature, however, did not choose to remedy or cure the objection in Hillsborough and deferred, as you well know, to the Florida Supreme Court to undertake and complete and finish the job in the covered areas with respect to the Hillsborough County area.

The state Supreme Court adopted a plan yesterday. We were in receipt of that yesterday afternoon and spent yesterday and last evening and this morning looking at that plan. It was—we were familiar with that plan before the Florida Supreme Court adopted it because it was very similar, if not nearly identical to a plan proopsed by one of the parties to this lawsuit. So we had a leg up going in.

[26] So on our own, sua sponte, we reviewed that plan last night and this morning. I cannot stand here and say the plan is going to be precleared by the Department of Justice.

What I can say, however, is something that I think will give the State of Florida some guidance as to what it needs to do from here. We do not see at this time any problems or barriers that would stand in the way of the Department of Justice giving preclearance to the state's plan, if the state chooses to submit it for Section 5 preclearance. We are prepared to review the plan on an expedited basis. And on an expedited basis I am talking about days, not weeks or months.

The state has filed a response to our motion yesterday that I was served with that has an alarming footnote which suggests that a 1974 Second Circuit case may stand for the proposition that state court decisions do not have to undergo preclearance. We believe that to the extent that that case does stand for that proposition, which I don't think it does, the *Hathorn v. Lovorn* case in the Supreme Court which was I believe seven years or eight years later makes that issue abundantly clear, that the plan does have to undergo preclearance, because what the plan adopted by the Florida Supreme Court does is it requires the State of Florida to implement voting changes, a redistricting in covered counties, and it is the implementation of voting changes by state [27] officials that has to undergo preclearance.

We may not have to have a dispute about that. My learned council on the other side of the room and I have discussed this this morning and we may have come to a meeting of the minds on this point and the state may well intend to submit this for preclearance as early as today. I would leave that to the—to the Assistant Attorney General to advise the court. But we are prepared to turn this thing around as quickly as possible. I spoke yesterday with the department back in Washington, advised them of the plan, I went over some of the details with

them, Assistant Attorney General in civil rights was consulted, and his position—it was his position as well as the United States' position.

JUDGE HATCHETT: Thank you.

JUDGE STAFFORD: Thank you, Mr. Hebert.

JUDGE VINSON: All right, sir.

MR. WAAS: May I, Your Honor?

JUDGE HATCHETT: Yes, Mr. Waas.

(Pause)

(Laughter)

MR. WAAS: I think the court can guess what that is.

JUDGE STAFFORD: Personal service.

MR. WAAS: May it please the court? With respect to the issue of preclearance, hopefully that issue will be a moot issue. We do know that—and observe that yesterday Supreme [28] Court of Florida adopted as the corrective action plan a proposal submitted by the Humphrey plaintiffs, the Reaves, Brown, Hargrett plan. And, of course, under the *Sanchez* case of about 1981, whether that evinces state policy is a matter that hopefully would not have to be addressed, should be a moot point. We ought to be able to get this matter precleared. I certainly think that the Humphrey, Reaves, Brown, Hargrett people on the plaintiffs' side here shouldn't have any concern about the Department of Justice's review of that plan, and that we will then have, without question, a valid state legislative plan for both the House and Senate.

It's been our position all along that with respect to the entire House plan, and with respect to 62 of the 67 counties embracing the Senate plan, that those plans are valid, enforceable and in effect as of the date that the Department of Justice issued its letter just ten days ago.

But we have now had the Supreme Court address that correction, we have a valid plan, it is now time to allow the elections to go forward and all of the matters attendant to the election process. We would hope that this court would allow that matter—those matters to occur.

We do have on the record the demonstration by the supervisors of elections which remains unchallenged that in order for the persons who are constitutionally and statutorily mandated to assure that the right to vote is protected and exercised consistent with [29] law, that these people who run the election machinery must be able to move forward expeditiously. And we would hope that there would be no obstacles placed in the way of that taking place. And that addresses the Section 5 concerns. It also addresses, and we put this in our notice of filing yesterday and in our motion to stay, any concerns set out in any of the plaintiffs' allegations with respect to the 1982 redistricting plan based on the 1980 census which we know was—is invalid at this time because we must redistrict. The legislature has done it, the Supreme Court has done it. Article III, Section 16 has worked.

With respect to the claims that are directed to the congressional plan, that has been taken care of by this court previously.

With respect to any claim seeking to engage in a competitive endeavor with respect to which plan this court may choose, that too is a matter that is now over with and done. The only remaining issues before the court embrace Section 2 and Fourteenth and Fifteenth Amendment consideration.

It would be our position that if that litigation is to go forward, it be done in the manner in which litigation has gone forward is a traditional manner. Let us file our response in a timely fashion, let us engage in the kind of discovery that these cases generate. Plaintiffs have said the words, we have said the words, we all agree that these are [30] fact intensive complex types of litigation, not the kind of litigation that can be addressed in an emergency fashion to adopt a valid plan that will be in place for this election go around in the next three or four days. We now have that plan.

So we would ask in those—in connection with those matters that the plan now go forward, that we have elections, and allow the Section 2 litigation to continue if at all in a dispassionate manner.

JUDGE VINSON: Thank you, Mr. Waas.

JUDGE HATCHETT: Any further argument from the plaintiffs on this matter?

MR. MEROS: Your Honor, on behalf of the De Grandy plaintiffs, I do not argue with his allegations concerning and his argument concerning Section 5 and the fact it needs to be precleared. I won't reargue that. I, of course, do contest what he is saying about Section 2 challenges, whether or not that plan can go forward without consideration.

JUDGE HATCHETT: We will talk about Section 2.

MR. MEROS: Right.

JUDGE HATCHETT: At this point we want to stay on the Senate plan as to Section 5.

(Discussion off the record)

JUDGE HATCHETT: Now, Mr. Meros, we want to be very sure about one thing. We understand, then, that you agree with the Attorney General's position that there is nothing [31] else for this court to do at this time as to the Senate plan under Section 5 of the Voting Rights Act?

(Pause)

MR. MEROS: Your Honor, the De Grandy plaintiffs assert that as we sit here today, there is no legally enforceable plan in effect. It has not been precleared.

JUDGE HATCHETT: We understand that.

MR. MEROS: And to that extent, the section—the—this plan cannot go into effect today. It is not legally enforceable. This court is still in the position of having to adopt an interim plan. The De Grandy plaintiffs do not object to the lines drawn in the Hillsborough County area. So I want to make that—

JUDGE STAFFORD: By the court, the Supreme Court.

MR. MEROS: By the Florida Supreme Court. We object to that fact that the Florida Supreme Court did it. We do not object here to the lines as proposed in that plan.

JUDGE STAFFORD: And it touches nine counties.

MR. MEMOS: Yes, sir. But that is not to say that we do not object—that we consent to that plan going into effect today, or that any plan can go into effect without analysis of Section 2 challenges or that it is legally enforceable anywhere in the state. It plainly is not.

JUDGE VINSON: But Mr. Waas has said for purposes of the ongoing Section 5 case, which is what we have been [32] concerned with up to this point, the state's position is that has now been taken care of by the Supreme Court of Florida, that is the state's plan which they have just submitted.

Separately, the Section 2 claims ought to be dealt with in a more leisurely fashion, he says. But the Section 2 claims remain viable and they are still at issue. Is that what you agree with?

MR. MEROS: Yes, sir. But don't let me suggest to you for a second that—that the 1992 elections ought to go forward with serious—

JUDGE VINSON: I understand.

MR. MEROS: —challenges to other portions of that plan and the House plan, because we would like to argue that because that is critically important.

And also I just want to make sure, Mr. Waas suggests that the plan outside of Hillsborough was at some time enforceable and is today enforceable. It is not. As of today there is nothing legally enforceable in the Senate anywhere in the State of Florida.

JUDGE HATCHETT: Thank you, Mr. Meros.

(Discussion off the record)

MR. CROWLEY: Your Honor, just perhaps a point of just clarification. I just want to reiterate I think what everybody knows and that is that the House plan was

clear—cleared by the Justice Department and there is no bar to its [33] implementation.

JUDGE HATCHETT: Very well.

Now we are going to turn—

MS. WRIGHT: Your Honor, could I just—

JUDGE HATCHETT: Sure.

MS. WRIGHT: I think it's important—I'm Brenda Wright for the Humphrey intervenors. I think it's important to put on the record very clearly what Mr. Waas handed to Mr. Hebert this morning was not a birthday card it was in fact a submission of the State of Florida of the plan that the Florida court adopted to the United States Department of Justice for preclearance. And that therefore it has been submitted for preclearance. It is under that review process.

We support the proposition that it must be precleared. Even though it's a plan that we supported, we believe that's the law.

JUDGE HATCHETT: We understand your position.

MR. GREGORY: (Indicating)

JUDGE HATCHETT: Yes, sir.

MR. GREGORY: May it please the court? Rodney Gregory on behalf of Reaves, Brown, Hargrett. Needless to say, we have absolutely no problem with what the Florida Supreme Court came up with. We have obviously approved the plan, as we did draw the same, and we would like, since apparently there is an agreement here or stipulation, we would [34] with like to see this court also approve the same plan, based on the review and as well as Supreme Court review. So if in fact this federal court were to approve the plan that the Florida Supreme Court came up with, then all that would be together, there would be that much more harmony and the state would be satisfied because they would have that much more additional leverage with the Justice Department's consideration. It would be great to see both courts could actually approve the same Reaves, Brown, Hargrett, Humphrey supported plan.

JUDGE HATCHETT: Thank you, sir.

MR. GREGORY: Thank you, Your Honor.

MR. ABRAMS:. (Indicating)

JUDGE HATCHETT: All right. Yes, sir.

MR. ABRAMS: My name is Willie Abrams for the NAACP plaintiff. Your Honor, we take the same position as the Justice Department that the Supreme Court's plan must be submitted for Section 5 preclearance. And we think once that is done, that the remainder of the case can proceed on a normal litigation schedule.

JUDGE HATCHETT: Thank you.

Now, we want to turn our attention to the Section 2 claims. I just told you that, of course, the Justice Department's case has now been consolidated with the De Grandy case. The motion to consolidate has been granted. I'm not [35] sure where we are as to service in that case, answers and all of those things, but we will leave that aside for right now.

It is the court's belief that a Section 2 case is far different from a Section 5 case, that there are burdens that the plaintiffs must be able to carry, and that due to the shortness of time, the court does not want to spend a lot of time if in fact the planitiffs are not going to be able to carry their burden. Therefore, the court is going to ask the plaintiffs, including the Justice Department to indicate to it what evidence if any you are going to be able to assemble to show bloc voting, to show political cohesiveness, and to show a dilution of minority voting strengths. If—and we believe that that evidence must be directed pretty sharply to the districts, specific districts under attack, not shotgun type attacks. And we are going to take a recess. We will hope that the plaintiffs will tell us whether any such evidence is going to be marshalled and how long it will take, how soon you would be able to put it on.

And I note, Mr. Zack, that you are going to argue, we know you are going to argue to us we should not do that at all, and the defendants will make that argument. When

we come back we will hear that argument. But we do want to hear all aspects of a Section 2 case and how soon it could be put on if in fact it's proper for this court to put it on.

So we will be in recess until 11—10:40.

* * * *

[37] We have reviewed the Florida Supreme Court Senate Plan. We find no constitutional or statutory infirmatives for purposes of Section 5 review by this Court. Consequently, paying due deference to the State of Florida, we adopt the Florida Supreme Court's Plan as outlined in its opinion of June 25, 1992, as the Florida Senate plan.

We are now ready to discuss—of course, a written order to that effect will be entered later today.

We are now ready to discuss Section 2 challenges to the plan.

MR. HEBERT: Your Honor, may I inquire of the Court about the announcement you just made?

JUDGE HATCHETT: Yes.

MR. HEBERT: Does that moot—is the Court saying that the State of Florida does not have to submit their plan for preclearance, and that the Department of Justice —this Court does not envision us to undertake any further review of that plan?

JUDGE HATCHETT: We now impose that plan as a Court-Ordered plan.

* * * *

[66] With respect to the Senate claims for Hispanic voters in Dade County, the NAACP does not have a position on that particular point. However, I would note to the Court that the Justice Department's representative has said here today that what they seek to accomplish on behalf of Hispanics in Dade County can be done without harming the interest of blacks in Dade County. Frankly, the NAACP remains unconvinced about that. We take that representation with a grain of salt, and we would

like the Court to be very cognizant of that and pay close attention, because we—in our analysis, the NAACP's analysis, of the House districts in Dade County, we do not reach the same conclusion that the Justice Department does about that point.

JUDGE HATCHETT: Thank you, sir. We will now hear from the defendants on the Section 2 claims.

* * * *

[78] JUDGE STAFFORD: Mr. Peters, when were you aware that there would be a Section 2 challenge by anybody in this case? You're the same Jim Peters that was here in January saying, "Give the legislature time."

MR. PETERS: Yes, sir.

JUDGE HATCHETT: You and Steve Zack, the same players over here, "give us time, give us time." Now, I want to know when it is that you say that you first became aware of the Section 2 challenge to whatever was going to happen in the Florida legislature.

MR. PETERS: Judge, as you recall, you—and I appreciate that fact—deferred to our defense in January that the Complaint is too early, nothing has passed. And, in fact, the Complaint before this Court in seven of its counts is an impasse suit which just ain't through. There [79] ain't no impasse. I think the only at viable count there is Count VIII, which speaks to the joint resolution which was passed after those other two Complaints were filed.

On April 11, as I recall, sometime in that proximity, we heard for the first time from the De Grandy plaintiffs and from the some of the others, their complaints about a legislative enactment, SJR-2(g), for the first time in the Florida Supreme Court. There wasn't a plan, a Section 2 claim that they could attack prior, because we didn't have court resolution. We knew they didn't like what we were doing. We knew they didn't like it in the abstract but there was nothing for them to attack a Complaint to until we passed the resolution.

JUDGE STAFFORD: Let me find out, in the House and the Senate, the plan, any plan, that was coming up would seem to me would involve, would it not, in the legislative decision, whether it's by the staff or by the elected representative or by the lawyers, some Section 2 consideration.

MR. PETERS: It was and it did, yes, sir.

JUDGE STAFFORD: And you were ultimately going to have to face that. Now, I'm not fussing with you. I guess what I'm trying to get across is, what is it that is out there in the hither somewhere that has not already been captured and put into the pot in this court or is [80] retrievable over the lunch hour? What's new is there under the sun that you have to go out now and create that is not already in the public domain available to us to consider?

MR. PETERS: Procedurally?

JUDGE STAFFORD: Yes, I'm talking about evidence.

MR. PETERS: A Complaint at issue with a mustering of evidence and experts to respond per the rules of court to a Complaint in the time that we have to respond. That was not the case, Judge, until approximately 30 minutes ago, which is our motion to dismiss. We ain't prepared to go to trial, Judge.

JUDGE STAFFORD: I don't think you answered my question.

MR. ZACK: Can I answer on behalf of the Senate, Your Honor?

JUDGE STAFFORD: Yes.

MR. ZACK: We don't have hundreds of races in Dade County. If we were going to input, it would be physically impossible in the economic environment we're talking about to input all of the races in every city and municipality in the state of Florida. When you have a Section 2 claim, you have—we talked about it in our last hearing, about a laser approach versus a scatter bomb, and we talked about we now understand what their com-

plaint is. Frankly, we had no idea there was going to be a Section 2 challenge in this [81] regard until the few days ago. The Supreme Court on May 13 invited any—said specifically that they retain jurisdiction for any Section 2 challenges, and no one filed one.

JUDGE HATCHETT: You have answered Judge Stafford's question. Do you have anything else to say, Mr. Peters?

MR. PETERS: The relative harm to them versus the rest of the state, I would suggest, is nil or slight given the fact for this Court to have a reasonable trial, if we lose, we lose, and have interim elections later to cure the problem. Today is the drop-dead date. It's over.

* * * *

[97] The last time, the last hearing that I stood in front of Your Honor I said, "Where is the Section 2 claim?" And silence from this side of the room. This is an effort to destroy the orderly electoral process that is about to begin. That is why in our last motion we asked the Court to consider deferring to the Supreme Court. As far as I'm aware, their invitation to consider these Section 2 claims is still there; that they are very familiar, all of these alternate plans have been submitted to the Florida Supreme Court. They have been fully briefed. And, respectfully, on the basis of the cases that we have cited in our brief on abstention, *Emerson*, most recently, *Jermono*, we would ask the Court to stay Section 2 proceedings and defer to the Florida Supreme Court. Thank you, Your Honor.

JUDGE HATCHETT: Mr. Cardenas?

MR. CARDENAS: Just very briefly; in the commentary on timing and preparation, Your Honor, if you will recall there is a very comprehensive order from this Court preparing us to commence trial on reapportionment, not only on the congressional, but the State House and Senate Districts.

* * * *

MOTION TO DISMISS HEARING

TR VOL. I

* * * *

[39] JUDGE HATCHETT: We are talking about the Voting Rights Act?

MR. ZACK: Yes, sir.

JUDGE HATCHETT: A right that was passed to rescue minorities from the whims of state legislatures and state voting procedure.

MR. ZACK: If there is a whim.

JUDGE HATCHETT: And to give those minorities immediate relief in a federal court.

MR. ZACK: When there is an immediate cause of action. We agree on both of those, Your Honor.

JUDGE HATCHETT: That's right. So it seems to me that you can't argue anything about state procedures to defeat [40] that jurisdiction. The state procedure was what the act was aimed at.

MR. ZACK: Only if state procedure violates the rights of the minorities. In this case it doesn't. It doesn't yet. And that's the key to the whole discussion, Your Honor.

JUDGE HATCHETT: If we were here today with an unconstitutional plan, would you argue that these plaintiffs do not have standing?

MR. ZACK: Absolutely not.

JUDGE HATCHETT: So your argument is that you're in a better position because you have no plan at all than you would be in if you had an unconstitutional plan?

MR. ZACK: No, Your Honor. My argument is that we will have a constitutional plan next Friday. That is my argument. And if we do not—

JUDGE HATCHETT: If the plaintiffs are suffering injury today, the Voting Rights Act gives them the right to relief today.

MR. ZACK: If you—

JUDGE HATCHETT: They don't want minorities to have to wait on state legislatures. That's why Congress passed the act.

MR. ZACK: If they are having—you are a hundred percent correct. If they are suffering a problem today, then [41] the issue is ripe and we are both saying the same thing. But what we are going to say to the court—

JUDGE HATCHETT: He agrees on the issue.

MR. ZACK: —we have no disagreement whatsoever. The question that the court has to decide, which we disagree on, is whether they are suffering an injury today.

JUDGE HATCHETT: All right. Now let's go to whether this court having jurisdiction should for some reason not exercise it.

MR. ZACK: First, the court has to decide whether there is an injury today.

JUDGE HATCHETT: That's right.

MR. ZACK: To determine whether it's ripeness.

JUDGE HATCHETT: That's right.

MR. ZACK: Then to decide whether or not they should set up a parallel track.

JUDGE HATCHETT: That's right.

MR. ZACK: We all agree on that.

JUDGE HATCHETT: If this court would begin taking evidence on drawing the plan, how would that interfere with anything that's taking place in the legislature, the Governor's office or the Supreme Court.

MR. ZACK: It would not, Your Honor.

JUDGE HATCHETT: That's right.

MR. ZACK: The question is whether this court [42] wants—

JUDGE HATCHETT: So, there is no reason for the court to abstain.

MR. ZACK: The issue—

JUDGE HATCHETT: In that aspect, it's good to stop any process from taking place. It's simply saying, head down the road with the plan.

MR. ZACK: And I'm not arguing that that should not occur, if there is no plan by next Friday. That's our only difference. If there is a plan—

JUDGE HATCHETT: So you're saying we should have stayed until next Friday?

* * * *

[43] If you find there is a present injury, I suggest, and I know the court will, rule that they are going to set up a parallel track. But don't get into a situation where there is no advantage and there is no injury shown which is their obligation to show. And that's what our motion to dismiss is geared toward.

With the limited time I have left, Judge Vinson, you asked the question about—the exact words were, no key role prescribed by law, whether there was a key role prescribed by law. There is no key role prescribed by law by the President of the Senate, for the President of the Senate, nor for

* * * *

[71] JUDGE HATCHETT: That motion is denied.

MR. ZACK: You wish us to proceed. Now that we've reached that point in these proceedings, Your Honor, we suggest to you that no discovery is necessary. The only thing that's necessary is to have a plan submitted and to have a special master look at those plans and have it decided at some point in time. So, we believe that the time that is taken here through discovery is not realistic and it is not necessary.

Moreover, Mr. Peters is going to address the various time frames that he thinks, if we are forced to comment on today, we wish to be our position.

Thank you, Your Honor.

JUDGE HATCHETT: Thank you, sir.

(Pause)

MR. PETERS: Thank you. On behalf of the House of Representatives.

A clarification. Is the court proceeding on a dual track with reference to both Congress and the House and Senate districts.

JUDGE HATCHETT: Yes. We don't know about a dual [72] track. We are doing what the Constitution says a federal court must do. If someone else is doing something, that's fine.

MR. PETERS: As I understand counsel and the court, it is not your purpose or intention to enjoin our process but to allow it to continue as state law.

JUDGE HATCHETT: There has been no prayer for this court to enjoin anything going on in the State of Florida.

MR. PETERS: With due respect—

JUDGE HATCHETT: We do not—if I can make it clear, we do not intend to enjoin anything, any process that is taking place, regarding elections in the State of Florida.

MR. PETERS: Speaking to the time frames proposed in plaintiffs' order, which I had not seen until five hours ago, with reference to the latter representation, respectfully, the legislature is in recess for the weekend. There are members meeting discussing this matter, the session is to continue on Tuesday for congressional. There will be another session perhaps as early as next week on state seats, perhaps. And the net effect of this order, particularly, given the suggestion of the discovery, respectfully, is just to disrupt, to destroy the ability of the state process to work. The courts have acknowledged this thing is a political process.

JUDGE HATCHETT: Evidently I'm not making myself clear. This court is not going to do anything regarding any [73] state process.

MR. PETERS: Indirectly, Judge, what I'm suggesting—

JUDGE HATCHETT: There are going to be no injunctions issued against any party to this lawsuit as a result of this hearing.

MR. PETERS: But what I am suggesting, Judge, is to enable—to allow particularly—and with this proposed deadline, an opposing political party, Republicans, to discover the Democratic leadership of state the legislature during a reapportionment session is to destroy the ability of that leadership, to coalitions, to do compromises, to have meetings with members in an attempt to get out of this mess we are in. If you allow them to depose the Speaker, the President, the Chairman, at the very time you're having to get the members to vote on plans, there will be no agreement. The process will self-destruct because of this court and the discovery.

JUDGE HATCHETT: You can't run a lawsuit without having discovery.

MR. PETERS: Yes, sir.

JUDGE HATCHETT: Discovery is part of a lawsuit.

MR. PETERS: Yes, sir. And people lose things as a result of discovery. You may be absolutely right, that the Republican Party would be able to discover something that is [74] happening within the Democratic structure.

JUDGE HATCHETT: Yes, sir.

MR. PETERS: And disrupt your process.

JUDGE HATCHETT: How else would you have a voting case in a federal court if no one could discover anything and it was a different trial than every other trial in the country?

MR. PETERS: Counsel just said something that is a ray of sunshine here, and the possibilities discussed last time. Counsel attempting get together by stipulations and agree to a lot of this stuff where there won't be the prospect of destroying our system.

Having said that, hoping that in each order you enter would allow us or require to attempt to stipulate, let me suggest deadlines. I understand I don't have a choice now. You're telling me to get you deadlines, is that right?

JUDGE HATCHETT: Yes. Ordinarily you don't get this opportunity.

MR. PETERS: I understand.

JUDGE HATCHETT: Ordinarily, the court just goes out and imposes deadlines.

MR. PETERS: I understand.

JUDGE HATCHETT: But the deadlines obviously are going to have to be so short in this case, if the case is going to move at all and have any effect, that we are [75] affording you the opportunity to talk about the deadline. So far, no one wants to do that.

MR. PETERS: I want to.

* * * *

TESTIMONY OF KIMBALL BRACE

TR. VOL. VI

* * * *

[176] MR. GREGORY: Your Honor. Excuse me, Your Honor. If we aren't—assuming for sake of discussion we're going to move into remedial stage, if that should be the Court's ruling, would we immediately move into that after the arguments tomorrow?

JUDGE HATCHETT: We would immediately move into whatever we have to move into, but, of course, the Court understands that sometimes you have to slow down an hour or so for everyone to regroup.

We're going to give ten minutes to the party in closing argument.

MR. GREGORY: Yes, sir.

JUDGE HATCHETT: You don't have to use it all.

MR. ZACK: If we do go into remedial stage, what do you think the time frames that we'de talking about, so we can [377] start understanding where the Court will be heading in that regard?

JUDGE HATCHETT: Well, as Judge Vinson says, it will be tight. We will give the counsel time to meet and discuss matters, however; work out any stipulations that they can. And then we'll go as quickly to that phase as we possibly can, if it's necessary.

MR. ZACK: If it's necessary.

JUDGE HATCHETT: If that phase is necessary.

MR. ZACK: We know it's hightly unlikely; however, we also recognize—what I'm trying to find out is it going to be a situation where the Court is going to set a time they're going to accept the plans and then there is going to be argument on those plans or is the Court just going to do what it's going to do?

JUDGE HATCHETT: Of course, we have not had a conference on all of this. It may be, if we get to the remedial stage, that the Court will direct the drafting of a plan.

MR. ZACK: Will direct a—

JUDGE HATCHETT: May draw a plan.

MR. ZACK: May draw itself a plan?

JUDGE HATCHETT: Yes.

MR. ZACK: Then nobody would submit plans at that point?

* * * *

TESTIMONY OF JAMES BURKE

TR VOL. VII

* * * *

[153] MR. ZACK: Your Honor, may the Senate be heard for one moment to respond to the issue of timeliness and prejudice, as specifically addressed by A and B, Rule 24?

As Mr. Dubbin stated, at least as I heard him state, his intervention is to the remedy stage. There would be no prejudice or timeliness question because we have not reached the intervention of the remedy stage of these proceedings, so if in fact there is no remedy stage it will be moot, and if in fact there is a remedy stage at that point he would be timely, would have pled in a timely manner.

* * * *

TESTIMONY OF MIGUEL DEGRANDY

TR VOL. II

* * * *

[162] Q Would you say based on the 1980 census data and compared to the 1990 census data where there has been an increase in Hispanic population in Dade County from 1980 to 1990?

A There has been a very significant increase.

[163] Q Okay. And has there been an increase or a decrease in the Anglo-American population in Dade County from 1980 to 1990?

A There has been a decrease in the Anglo population and the black population has remained almost stagnant, almost the same numbers.

* * * *

TESTIMONY OF MIGUEL DEGRANDY

TR VOL. IV

* * * *

[22] With that in mind, we then started by crafting the minority seats first and then crafting the rest of the plan. We had that theory actually throughout all of the state's plan. Our goal was to craft the minority seats first, and then draw the rest of the plan around it.

In doing that, we ascertained that the way to better do the minority districts in the Dade County area for the Hispanic community is to draw them north to south. Some of the plan—the current plan that we see today is drawn east to west, which severely impacts the Hispanic community. You see some of the seats that we sit in now are 89 percent Hispanic. By doing it the way we did it, all of our seats came within the ranges of 65 percent to 68 percent. Some of them came in, I think one or two over 70 percent just because the areas were so concentrated.

We did the same with the African-American communities in the northeast. We were able to draw one additional seat to that which exists today, and we took great pains to try to—

Q. Excuse me just a second. When you say you were able to draw one additional seat as compared to that which exists today, would you explain that a bit for us, please?

A. Well, right now you have the three representatives from the Dade County area. You have Darryl Reaves; you have

* * * *

[39] Q. Do you have personal knowledge, Mr. De Grandy, of discriminatory efforts to protect the white Anglo incumbent in the plan now described as the Florida plan?

A. Yes, sir.

Q. Would you describe that understanding and knowledge?

MR. PETERS: Objjection. They are claiming a Section 2 claim. It is not a Fourteenth or Fifteenth.

[40] JUDGE HATCHETT: I'm sorry. I can't hear you.

MR. PETERS: Objection, relevance. They're claim is a Section 2 claim. It is not a Fourteenth, Fifteenth Amendment claim.

MR. RUMBERGER: I'm not sure it really matters.

JUDGE HATCHETT: I'm still not sure I understand your objection.

MR. PETERS: I withdraw the objection, Judge.

JUDGE HATCHETT: Very well, it's withdrawn.

BY MR. RUMBERGER:

Q. Mr. De Grandy, do you recall the question?

A. Yes, sir. I do have knowledge.

Q. Can you respond to it, please?

A. Well, in our conversations with leadership and the people in leadership that were drafting the plans—

Q. Which would be who?

A. Which would be the committee chairmen like Mr. Burke, Mr. Deutsch, Mr. Cosgrove, who was vice president, Mr. Logan who was intimately within the leadership group on the redistricting process.

Q. This is the leadership of the defendant House, correct?

A. That's correct. It became very apparent to us that—

MR. PETERS: Objection to the extent that the witness is talking about "us" and "we."

THE WITNESS: To me, I'm sorry.

[41] MR. PETERS: The question is for his personal knowledge. To the extent he is testifying about others, it is hearsay.

JUDGE HATCHETT: He is going to talk about—we'll sustain it, but I think he is going to correct it and say as to him.

MR. RUMBERGER: Yes.

BY MR. RUMBERGER:

Q. As to you, Mr. De Grandy.

A. It became apparent to me that there were some people that had to be, from their eyes, protected at all costs. I had, for example, conversations with Mr. Logan in which—and some were heated and some were on the floor in debate—in which we—I was frustrated because we had demonstrated clearly that 11 could be drawn, and I said, "Look, we are drawing all the African-American seats that you want. Why can't we have equality for the Hispanic community?" Basically his response was that if we did it the way we did it, it would take out Elaine Bloom, and we would have to protect the speaker pro tem at all costs.

Q. All right, sir. Any other actual conversations with leadership or other information obtained from the leader-

ship which indicated that there was a movement or efforts to protect the white Anglo incumbents?

A. Conversations with Mr. Burke were of the same nature; [42] and, actually, the conversations with him were, he was more, "Well, don't worry about it. We can always fix that in court for you later on, but we have to take a political position, and we have to be good Democrats." Conversations that I have had with Mr. Bo Johnson indicate basically the same thing.

Q. All right. Thank you.

MR. RUMBERGER: No further questions at this time.

MR. VIGIL: The United States has no questions.

JUDGE HATCHETT: Mr. Peters.

CROSS-EXAMINATION

BY MR. PETERS:

Q. In the course of your answers you used the word "we," we did this and we did that. Who is the "we" that you are referring to?

A. When I say "we," I'm talking about, one, about Mario Diaz-Balart, who was as involved as I was in the process, and mainly the Hispanic Caucus.

* * * *

TESTIMONY OF WILLIAM DEGROVE

TR VOL. VII

* * * *

[11] Q What about the Hispanic population?

A The next panel down gives similar data for Hispanics. I do not have the data for 1950, but in 1960 you can see that we had in the state 70,195 Hispanics comprising only 1.4 percent of the state's population. 40.6 percent of these were native Floridians, and significantly, the largest group were living in Dade County

and the second largest group lived in Pinellas/Hillsborough.

As you follow the decades forward to 1960, the Hispanic population has grown dramatically. Its percentage of the state's total has now risen to 12.2, and the percent

* * * *

[13] A Yes.

Q That's actually on Page 8.

JUDGE VINSON: Got it.

MS. BUTLER: Okay.

BY MS. BUTLER:

Q Could you explain to the Court what this is?

A Yes, and I would like to use ink pen and paper to do this, if the Court would allow.

Q By the ink pen, do you mean chart that's—

A Magic marker.

Q May he do that?

JUDGE HATCHETT: Is it possible for him to give his ultimate conclusion without doing this?

MS. BUTLER: It certainly is, Your Honor, but there seems to be some question about whether this methodology actually produces results that are accurate, and if there's any question about that, I certainly want to explain.

BY MS. BUTLER:

Q Would you tell us what you ultimately conclude based on the chart that's here in the—what the purpose of the chart was that you were trying to deal with?

A What we are exploring here, if you'll read the written material on this chart, is the relationship between the percent of VAP, voting age population, in Dade County which is noncitizen. That—the relation of that variable to the [14] percent of the VAP that is Hispanic, and that's done by a bivariate regression model. And

what you see in front of you is the regression line. It's the best fit line to the census tracts in Dade County where the Y axis is the percent noncitizen.

* * * *

Q Before you—will you explain where the information came from that's going to go into this chart, where the actual numbers come from?

A The census bureau has released certain detailed data on magnetic tapes. Those are called summary tape files. The summary tape file 3-A—and let me explain that. The 3 indicates that that's detail data from the sample questionnaire. Every household receives a questionnaire. A proportion of households receive a detailed questionnaire. Detailed questionnaires ask very in-depth questions, and the questions we are trying to answer here are not asked of [15] everybody. That's what the 3 means that the data have been aggregated at the—no lower than the bloc group level. Bloc groups are 5- or 600 persons on average. They are the unit just below census tract, geographic unit.

* * * *

Q So your Y axis then, percent not citizen—

A What we are trying to relate here is the Y axis, which is percent noncitizen, to the X axis, which is percent VAP Hispanic. Both of these are VAP, let me underscore that. The census bureau has given us on this tape the percent of VAP who are citizens and who are not citizens. But they have not told us whether those people are Hispanic or whether they're Anglo or black or white. So—and they have told us, of course, the percent VAP—percent VAP Hispanic in all the census units.

So the statistics involved is to relate these two variables and attempt to extract some usable information from it. And we use bivariate regression to do this. And we—what we plot are the locations of the census tracts in [16] Dade County. For example, if there is a census tract that's 73 percent Hispanic and it's 43 percent non-

citizen, it would land right about here. (Indicating).

Then, as I believe testimony has been issued in the Court before, these data are fitted—these census tract coordinates are fitted with a least squares line. That means it's the best straight line that can go through the dots minimizing the distance squared of the dots from the line. That's why it's called the least squares line. Statisticians generally accept this—I'd say universally accept the least squares fit as the best linear model. Linear meaning we have fit the data with a straight line. There are other ways to fit the data.

JUDGE HATCHETT: Mr. DeGrove, we understand the methodology.

MS. BUTLER: Are you ready to be cross-examined on it, Your Honor?

JUDGE HATCHETT: No, we're ready for the next question.

BY MS. BUTLER:

Q You were about to tell us when you cross the 100 percent point this tells you the estimate of the line?

A Let me tell you the 100 percent line on up, the zero percent line, and you'll see that this least squares line intersects the two lines and it gives you two points of [17] major interest, and let me explain. The intersection at this point is the percent of those tracts with zero Hispanics who are noncitizens, and I found that this line intersected at about nine and a half percent, or .095, .95, nine and a half percent, indicating that if you have a track with no Hispanics in it, you would expect nine and a half percent noncitizens. As the line goes across to the 100 percent VAP Hispanic, the intersection point is about .55. If you can look on my chart, you will see that, and if you can follow across with your finger.

This represents, then, the—by 100 percent, a tract of all Hispanic persons, VAP, and the model implies that 55

percent—I didn't draw this exactly right—implies that 55 percent of them would be noncitizens.

Q Fifty-five percent of the Hispanic population in Dade County are not citizens according to this calculation?

A No. Fifty-five percent of the persons in a tract, which is 100 percent Hispanic, are not noncitizens.

Q From which you then assume what?

A Well, we—I examined an independent—a test of this. I was provided the census record by a colleague for the whole county in which you can calculate the percent of Hispanics in the entire county who are noncitizens. The colleague gave me the figure of 32—32 and a fraction percent.

[18] Q Let's make sure we clarify that. That's the percent of the total population VAP that is not a citizen, is that correct, 33 percent?

A I'm commenting on the Hispanic now, Hispanic VAP in Dade County, Hispanic VAP in Dade County. My colleague, who examined the census bureau record—there's a record for Dade County, a single record from which you can read directly VAP Hispanics and total noncitizens. You can do simple division and derive a figure. I did not do the work, but I would—I took the VAP Hispanic in Dade County, which we know to be 50 percent, and it's been introduced in evidence in this court. And if you take the 50 percent and project it up to the regression line I found, it crosses very close to 32 percent.

Q What that means then is that in precincts that are about 50 percent Hispanic, you're going to find 32 percent noncitizens?

A That's correct.

Q And 32 percent is the rate of noncitizenship for the entire county?

A It's the overall rate, yes, that's correct.

* * * *

[19] Q Mr. DeGrove, based on your analysis, what percentage of the Hispanic voting age population in Dade County are citizens?

A Based upon this analysis, it would be about 32 and a half percent—I'm sorry 32 and a half percent would be noncitizens.

Q Of the whole county now, let's just talk about the Hispanics. What percentage of the Hispanic VAP in Dade County are not citizens?

[20] A Are not citizens? About 32 and a half percent.

* * * *

Q Look at your 100 percent line and tell me what that figure is. Isn't this a percent of Hispanics in Dade County that are not citizens?

* * * *

THE WITNESS: The right-hand side of this line—It's early in the morning, I'm sorry—is a tract that is 100 percent Hispanic. In that tract, 55 percent of the VAP are noncitizens. The 32 percent is the average for the entire county.

Q I'll ask you again, see if we can't get this straight here. What percent of all the Hispanic citizens do you estimate from this are not citizens—Hispanic population, voting age, are not citizens?

A Fifty-five percent of Hispanic VAP are not citizens.

* * * *

[21] Q Again, doctor—Mr. DeGrove, this is the standard methodology by which you would estimate the percent noncitizens for the entire Hispanic population. Is that an accurate statement?

A I think so, yes.

* * * *

[25] A Well, you can see from this chart when a Hispanic district is about 66 percent, citizenship considerations reduce it to about 50 percent. So to the extent that De [26] Grandy plan has districts below 66 percent, they will be depreciated below 50 percent when you you correct for citizenship.

* * * *

[27] Q Would now like to turn to Joint Exhibit 3.

Q Mr. DeGrove, what does Joint Exhibit 3 demonstrate?

A This is a similar adjustment for Senate districts and it simply multiplies the citizenship rate for Hispanics, which is given at the bottom of the sheet, by the Hispanic VAP for the different plans, produces a new citizenship VAP for Hispanic, does the same for noncitizens, and produces a new percentage for the Senate proposed plans.

* * * *

[28] Q Mr. DeGrove, would you assume that the District 34 in the Florida plan was 66 percent Hispanic VAP. By the time it's been reduced for noncitizens, what is that ultimate percentage?

A Districts that are at 66 percent VAP Hispanic, when [29] corrected for citizenship, will reduce to about 50 percent.

Q The actual figure is 49.46 percent?

A Yes, it is.

* * * *

Q Mr. DeGrove, have you seen a census figure for total number of noncitizens in Dade County?

A Yes, I've seen that.

[30] Q And what is that figure and where did it come from?

A If came from the county summary record. Mr. Linc Clay in the Senate ran the data. And the record provides the total number of VAP Hispanics and the total number —I'm sorry, the record provides all the data for the county. It is the county record on the STF 3-A tape. And it's—the mathematical calculation has been done from the record and shows that 32 percent of the persons in Dade County are noncitizen.

Q Thirty-two percent without regard to—
A Without regard to ethnicity.
Q And does that figure correspond—corroborate your—
A Yes.
Q —regression estimate?
A Yes, yes.
Q And that's not an estimate in any fashion?
A No, the census record is actual count.

* * * *

[31] Q Going back to Joint Exhibit 1, the very last page of Joint Exhibit 1?
A Yes, I have it.
Q All right in about two sentences would you explain to the Court what this chart demonstrates?
A This is a simple chart of the mean housing value in Dade County for Hispanics heads of households and non-Hispanics heads of households, and also then in the bottom the Hispanic percent of the non-Hispanic. And it simply shows that Hispanic housing value is very close to non-Hispanic housing value. And housing value is a social substitute, frequently, for economic status. We do not have—the census tapes are not all out yet and this was available. [32] It, I think, indicates strongly that Hispanic persons in Dade County are not relatively deprived economically with respect to the non-Hispanic population.

* * * *

[38] Q So it's—in the nature of a county-wide figure, 55 percent. Fifty-five percent of the Date County Hispanics of voting age population are noncitizens, according to your data?
A Yes.
Q So you now have a county-wide figure, and based on the country-wide figure of non-citizen, you then calculate out for districts, and let's take that long chart here.
A Yes.

Q Which I beleive is marked as Joint Exhibit 2?
A Yes.
Q And you take the 55 percent county-wide figure and you apply that to every district?
A Yes, we did.
Q Under the Reaves/Brown/Hargrett plan that majority VAP Hispanic, and you apply it to all of the majority house districts under the Florida plan, and then you performed these calculations that are set out in this graph?
A Yes, we did.
Q But these districts are not county-wide Hispanics, are they?
[39] A They are a subset of the tracts from which the equation was derived.
Q And isn't it a fact that within the Hispanic population there are some tracts where there are higher levels of citizenship than there are in others?
A Certainly.
Q So it really is quite misleading, isn't it, Doctor, to take a county-wide figure and apply it?
MS. BUTLER: I object.
JUDGE HATCHETT: Objection overruled.

BY MR. HEBERT:

Q Is'nt it misleading to take a county-wide figure of noncitizenship rates for Hispanic and then use that figure knowing that noncitizenship rates vary among Hispanic citizens and apply it to every district as if they are the same level of noncitizens?
A No, I disagree. This equation is developed from the tracts, fairly small units. They are the tracts themselves which compose the districts in question. Some of these districts will be—on this table you mentioned, will be overestimated, and some will be underestimated. I don't purport that they will all be exactly as shown. Certainly Hispanic neighborhoods vary, but this is the Dade County average.

* * * *

[40] A No, let me tell you what I've assumed. I have divided that district into two pockets of persons, Hispanic persons and all other persons. I've treated that proposed district as though it were two pools. The regression line intercepts the two points, the zero intercept is for persons who are non-Hispanic, which is the .0956 calculated to be alien, and on the far right-hand side, the Hispanic pool intercepts at 55 percent. By treating the district as two pools, I made two separate calculations. And re-summed to get the new Hispanic VAP percentage as you see on column 3.

* * * *

[45] JUDGE VINSON: May I ask a question? Mr. DeGrove, on your standardized residual histogram—

THE WITNESS: That's the thing I mentioned just a moment ago, sir.

JUDGE VINSON: It appears to me that it is skewed [46] slightly, if you plotted it horizontally it would be skewed to the right. Is that a fair assumption?

A It's not perfect. It is—let me look at it.

MS. BUTLER: What page are you on, Your Honor?

JUDGE VINSON: Page 12.

THE WITNESS: It trails off to the left somewhat if you turn it sideways.

JUDGE VINSON: Well, for example on the negative side you don't have any points after 22—after 188. And you have—you have an extraordinarily large grouping right in the category from minus 130 and minus 75, correct?

THE WITNESS: There is a tail grouping on the left-hand side, that's the plus side. Do you see that?

JUDGE VINSON: Yes.

THE WITNESS: Yes, they are not a perfect normal distribution. For social research, I've seen much worse, sir.

JUDGE VINSON: Well, on your probability curve, the next page, 13, it's actually a general S curve, correct?

THE WITNESS: Yes, this is simply a cumulative plot of the previous one you've seen.

JUDGE VINSON: What does that mean in the middle portion where it's above the expected line?

THE WITNESS: The cumulative sum of the residuals has changed sign. Let me add, sir, I ran a nonlinear model [47] on the same data and it was no better. I ran a weighted regression model on the same data. It was a little poorer. If I can draw your attention to the statistics for the model, the multiple R, the R squareds, et cetera, and the standard errors, just about three pages back, these were—these measures were the best measures of the three models I ran.

JUDGE VINSON: Standard deviation on the outside is .9981.

THE WITNESS: Well, there are two standards errors given. The standard error for the regression coefficient, which produces this 55 percent estimate is .0236 or about two percent. The standard error for the constant term, which is the left edge of the chart, that would be the intercept at nine percent, that error is about 1.3 percent. So the mathematics gives us immediate estimates of the errors of the slope and intercept.

JUDGE VINSON: What I'm really concerned about is the middle—not the intercepts on the outside but the middle part of your line.

THE WITNESS: Yes .sir.

JUDGE VINSON: What is your error on that?

THE WITNESS: The standard error of the slope, which is .0236 in tihs kind of analysis minimizes at the mean of the X variable, so that .0236 applies at about the [48] 50 percent point. Can I go back to this chart a minute, sir?

JUDGE VINSON: Well—it's probably not worth that. I was just trying to see how closely it seems to fit in the middle once you draw the straight line. It seems to me that the middle is where the greatest error is lying.

THE WITNESS: No, sir, the greatest error is actually at the two ends. The competence limits of A regression line are slightly flared at each end. These are not sample

data, and statisticians will argue whether applying competence limits in these standard errors is even correct. I would support—I would say that might be beyond our limits here, sir.

JUDGE VINSON: What are your data points, so I know exactly what—what have you used when you plotted those data points? What is that—

THE WITNESS: Two hundred and sixty-four census tracts in Dade County, and the two data points are the percent VAP Hispanic and the percent VAP not citizen for the tract. The points—the scatter plot itself is not presented, only the residual plots, sir.

* * * *

[49] Q Mr. DeGrove, between using county-wide adjustments for citizenship and no adjustments whatsover, which is going to produce a more accurate picture of citizen VAP in these districts?

A I would say this analysis would.

Q Do you know what accounts for differences in citizen rates for the different census blocs or census tracts with the same level of Hispanic population? For example, I assume if we had a scatter plot up here we would see that at the 50 percent point there would be a range of dots?

A Yes, that's true.

Q Any idea about what accounts for that difference?

A Older Hispanic neighborhoods that are in the central part the ciay and settled would presumably have higher citizen levels. We had Nicaraguans immigrated into Florida recently, we have new arrivals every day. So these neighborhoods where the new arrivals live will have higher citizenship rates—or noncitizenship rates, excuse me.

* * * *

[52] JUDGE STAFFORD: My question is if you knew the confines of the district, could you have not calculated a more precise figure for each of these districts?

THE WITNESS: If we knew the confines of the districts, the census tracts specific to that district, we would run a regression model just for that district and we would develop a new line for that district. The sample size might be small and the line might be subject to some much large error. Yes, that could be done, sir. You could in fact do 11 regressions in Reaves/Brown/Hargrett and nine regressions for the State plan.

JUDGE STAFFORD: It's possible to do it?

THE WITNESS: Yes, it is.

JUDGE STAFFORD: Is there any reason why it wasn't done?

THE WITNESS: I think the smaller sample size would present statistical problems, yes, sir.

[53] JUDGE STAFFORD: Okay.

THE WITNESS: I also—you would have to aggregate—you have many tracts that are split. I'm not sure what we would do with those. That would take some work and judgment.

MS. BUTLER: How long would it take you to do that, Mr. De Grove?

JUDGE HATCHETT: The question is how long would it take you to do that, Mr. De Grove?

THE WITNESS: Me?

JUDGE HATCHETT: Well, how long would it take to do that?

THE WITNESS: We would need some statistical assistance and the computer and—two, three days.

JUDGE STAFFORD: Could you have done it since January?

THE WITNESS: I didn't have these districts since January, sir.

JUDGE STAFFORD: Okay.

THE WITNESS: The tape that I used has only been in the state a few weeks.

JUDGE STAFFORD: Okay, thank you.

JUDGE HATCHETT: Thank you, Mr. De Grove. If you'll call your next witness.

* * * *

[61] THE WITNESS: The way that's defined is the student or the parent would indicate on the registration form.

JUDGE STAFFORD: The school registration form.

THE WITNESS: Right.

JUDGE STAFFORD: That the child is Hispanic?

THE WITNESS: Is of Hispanic origin, yes. They have also, as of last year, began the process of identifying countries of origin. However they indicate whether or not they're black, non-Hispanic, white, non-Hispanic, Hispanic, Asian, specific islanders and others.

JUDGE STAFFORD: So a third or fourth generation child in Hillsborough County would be counted a Hispanic

* * * *

[153] MR. ZACK: Your Honor, may the Senate be heard for one moment to respond to the issue of timeliness and prejudice, as specifically addressed by A and B, Rule 24?

As Mr. Dubbin stated, at least as I heard him state, his intervention is to the remedy stage. There would be no prejudice or timeliness question because we have not reached the intervention of the remedy stage of these proceedings, so if in fact there is no remedy stage it will be moot, and if in fact there is a remedy stage at that point he would be timely, would have pled in a timely manner.

* * * *

[167] MR. ZACK: Yes, Your Honor, as the Senate, we, of course, adopt all relevant portions of the testimony of the House, that of Dr., Mr. De Grove, and all other exhibits that have been submitted on behalf of the House as Senate exhibits and Senate testimony in toto.

If that is acceptable to the Court we have succeeded in coming to where we want to be, and that is the end of the Senate case.

* * * *

[180] MR. CARDENAS: Your Honor, there are a number of issues that I believe have not been answered.

Number one, I don't think we have ever deviated from this court's previous ruling that this court was proceeding on the basis of voting age population.

I thought that there was significant argument regarding that matter, and that this court had made a ruling that bound all of us.

Subsequent to that there were, there was commentary relative to the issue of citizenship, but if Your Honor recalls specifically there are matters of evidence, however specifically deemed nonadmissible because of Your Honor's previous ruling.

This court has consistently taken a position [181] regarding VAP, contrary to what Mr. Zack is now trying to allude, and the issue of citizenship was brought in as to, as an afterthought complimentary process, but certainly not to convince this court to change its ruling on the matter.

All that we are doing here on a very minute issue of this litigation is to provide this court with our sides perspective on those matters which were testified to regarding without in any way, shape or form deviating from the previous rulings of this court regarding the mandate or voting age population.

And furthermore, Your Honor, regarding that particular item, to give one full day on a four-day compact trial to a minute issue that has been dealt with and all we are offering is not all we are offering is rebuttal evidence because of Dr. Lichtman's absence in my opinion, respectfully, Your Honor does not warrant reopening a process for a full day on an issue which is not deserving 10 percent of the Court's time in view of the whole process.

JUDGE HATCHETT: There is abundant evidence in the record regarding citizenship. We would expect the parties to argue citizenship versus the VAP at the appropriate time.

Now, is there anything else we need to take up [182] before we break?

* * * *

TESTIMONY OF JOHN GUTHRIE

TR VOL. IV

* * * *

[150] Q Mr. Gutherie, would you advise the Court what your roll was in the reapportionment process this year?

A I was Staff Director of the Senate Committee on Reapportionment.

* * * *

[152] A Yes. I was asked by this Court in the Congressional hearing to assist Mr. David Gelfand in the preparation of the Congressional map that was ultimately adopted by this Court. And, in fact, spent hours with Mr. Rose, his assistant, and Mr. Gelfand in putting that map together.

I also was asked by the Florida Supreme Court to assist them with preparation of the map which was finally adopted by them and we see before us as the Florida plan.

Q How many plans were developed using the Senate redistricting system?

A More than three thousand plans have been generated during this process, three hundred of which were submitted to a final process of producing maps and statistics, a hundred of which—a hundred legislative plans of which were introduced for formal consideration by the legislature.

* * * *

[157] THE WITNESS: A different approach is taken with plan 180. The two majority seats, in that instance, are in Dade County and in Broward County. The second district coming out of Dade County, in order to get sufficient numerosity for an African-American voting age majority seat must extend all the way into the Fort Lauderdale area. Fort Lauderdale, in the Florida plan, or Fort Lauderdale and the adjoining communities to the north constitute two thirds of the majority African-American VAP district in the Florida plan.

Because this large concentrated population in downtown Fort Lauderdale is not available for a further access seat or majority society north of Dade County, what plan 180 has to do in order to accomplish that end is string a district, as we discussed earlier, district 28, going from Pompano Beach north [158] to Vero Beach in Indian River County and west to Fort Myers on the Gulf Coast.

* * * *

Q Now, would you do the same analysis, if you will, with the De Grandy plan.

A The De Grandy plan is similar to the Hargrett, Reaves and Brown plan—in fact, it might be easiest at this point to put the two of them together—in their approach to South Florida. As has been discussed, the district 35 in the De Grandy plan has a 55 percent Hispanic voting age majority.

Q Thta's the one that takes in Miami Beach?

A South Beach, as well as the Little' Havana area and actually the Windwood area, Windwood, South Beach and Little Havana.

Q Were you here for Dr. Moreno's testimony?

A I was.

Q Is that the area that he referred to in Miami Beach that had the new arrivals, Hispanic arrivals?

[159] A Yes, it is.

Q Thank you. Continue, please.

A Also, parenthetically on that point, I, like Mr. Hoffeler, have spent countless hours—I can even almost quantify it—I mean literally hundreds of hours in front of a computer screen during the past several months since we have been developing Congressional, Senate and House of Representatives plans.

And one of the things I have discovered, the technology that we employ enables you for each tract or block or whatever unit of geography you're looking at to indicate the numbers of persons broken down into racial categories, also to indicate or the machine will also indicate to you

the percentage of those persons who are registered voters or who are voting age populations.

And one of the observations, stunning—striking observations that I made early on using the Census data were that the areas just south of the Miami River and just north of the Miami River, near the bay in Dade County, have exceptionally low registration counts. Registration in the range of 12 percent to 15 percent was common in that area.

Q That's the area that constitutes the lowest 62 percent, I believe it was, or 61 percent? Would you look at your statistics?

A Fifty-five percent African-American VAP.

* * * *

[160] THE WITNESS: District 35 in the De Grandy plan has a 55 percent Hispanic voting age population.

Q And in district No. 35 in HR&B?

A In HR&B, I believe it's 65.7 percent. The notes that I have here are documents that have been submitted to the Court. And I went ahead and assembled those in notebook form so that I could less clumsily and hopefully speed this along a little bit in answering such questions.

District 35 in the Hargrett, Reaves and Brown plan is 65.7 percent African-American—or Hispanic voting age population.

Q And that's the area that has twelve percent registration?

A Significant numbers of tracts within that district have registration levels that low, yes.

* * * *

[161] Q So, in order to create the problematic, as Dr. Moreno's words are—fourth Hispanic seat, you need to go through these machinations and the ripple effect is as you describe it to this Court?

* * * *

Q To create the fourth problematic seat, Hispanic, have you explained the ripple effect in both Hargrett, Reaves and Brown and De Grandy?

[162] MR. HEBERT: I object to the form of that question as well, Your Honor. There are a number of different ways to draw districts in South Florida. And simply to assume that a fourth district has to be a problematic seat when there is testimony also from other witnesses that says it isn't a problematic, in fact, a great weight of the evidence.

MR. ZACK: I'll withdraw the word "problematic." The Court can decide for itself.

* * * *

[163] A I have seen no plans that have four Hispanic majority seats and three VAP majority seats and three African—two African-American majority VAP seats and an African-American access seat in South Florida which does not result in a configuration for one of the African-American seats.

JUDGE VINSON: You stopped in mid answer and started. Would you say that answer again, start to finish?

THE WITNESS: Okay. I am aware of no plans that have been—I am aware of no plans that have been proposed either during the legislative process or the subsequent legal proceedings which provide four majority VAP Hispanic seats—and in most cases with the Hispanic seats, a prior testimony has indicated, persons are looking for a super majority because [164] of the problems with citizenship and lower registration rates—four Hispanic majority seats, two African-American majority seats and a third African-American access seat in South Florida, which does not result in seats similar to district 28 or a district similar to district 28 in the Hargrett, Reaves and Brown plan or district 24 in the De Grandy plan.

BY MR. ZACK:

Q And to make sure it's perfectly clear, the Hispanic VAP's, you're talking about super majority that will in fact elect a Hispanic is what you are looking at and you haven't been able to find one?

A Yeah. I'm really not qualified to testify as to the effectiveness.

Q I just want to make sure that we're clear. Now, in both HR&B and De Grandy, they both eliminate district 40 in the way that the Senate plan had it; isn't that correct? They both have the No. 40. What is the difference between the No. 40 in their plans as compared to the Senate plan?

A Well, the particular No. 40 in both those plans are districts which are based in Hialeah, which would likely elect a Hispanic, which have Hispanic super majority VAP percentages.

* * * *

[167] BY MR. ZACK:

Q Would you walk the Court through those maps, please? First of all, what is the object that you are holding in your hand?

A The point of this was to provide an easy reference as to a scale of miles, so we can get a sense of what we're talking about. So the length of this ruler here on the map here is 20 miles. Okay. That's just to put—

Q That's in five-mile segments?

A Correct. The first plan is the Florida plan here in 267. And what this map provides is a street-level or block-level detail of how the districts in that plan—what the district in that plan look like. A lot of times when you reduce these maps to a eight-and-a-half-by-eleven sheet of paper or even to a thirty-six by thirty-six map, some of the detail as to how the districts are designed is lost.

So, what you see is that the Senate plan starting in Monroe County has a district which comes up through

the Florida City, Richmond Heights, Homestead area and then up west of Cutler Ridge, along a fairly narrow path of US1 and into the Overtown/Liberty City area. That district, as I described it earlier, is a 35.5 percent African-American majority district.

Q That's 40; right?

A That's correct. And then the other, it also has district 34 here in the green, which is a Hispanic-American majority district. The percentage on district 34 is 66.3 percent [168] Hispanic VAP.

District 37, including Kendall Lakes, Westchester and most of the areas in southwest Dade County, is 64.3 percent Hispanic voting age population. And district 39, which is based in Hialeah, also includes Miami Gardens and areas to the west, is a 76.1 percent Hispanic majority district.

On this chart here, on the chart for the HR&B plan or Senate plan 180, you see, as we discussed on the smaller map, how district 36 was composed. Again, as in the Senate map, it includes the Florida City area, up through Homestead and Richmond Heights, then a very narrow path along US 1—in some places the distance between US 1 and the railroad track—up through the south part of Dade County, through Coral Gables and just east of the airport, down the Miami River and finally into the Overtown or Liberty City area.

Q Can you tell the Court how many miles we're talking about then, that is basically with US 1? Fifteen?

A Well, the thin path there would be, yes, approximately fifteen miles linear. From the—

Q If you drove through the district with both doors open, you would kill people on both sides of the straight; is that a fair way of describing it?

A I guess you could say that.

Q Go ahead and continue describing it.

A Another point I guess you could make about this map: The [169] district 35 in the Hargrett, Reaves and Brown plan, we have already discussed, is a 65 and a

fraction Hispanic voting age percentage district. The way that they are—that that is accomplished is by including the Hispanic persons in the South Beach area, the west side of Miami Beach. Actually, this is Collins Avenue along here. And the property east of Collins Avenue, for a stretch of approximately five miles, is in district 38, which would be an Anglo district. The territory west of Collins Avenue on Miami Beach is in district 35. But district 35, as I explained, is a Hispanic majority district, as is district 34, district 40 and district 33.

District 32, as you see, begins in the Opa-Locka area; actually, Opa-Locka is divided by district 32. It includes the neighborhoods in north Miami Beach and then goes up into south Fort Lauderdale. Actually, these particular tracts here do not include very many African-American persons. There is a concentration of African-American voters in the Cutler Ridge's area and also in west Dania and Hallandale. But there are large numbers of white persons included in this district. Then it comes up into Fort Lauderdale.

Q Show us what 28 does, the one that you described before. And now you're talking about this plan, 180; isn't that correct?

A That's correct.

Q Which is—

[170] A Which is the Hargrett, HR&B plan.

Q Okay.

A District 28 begins in Fort Lauderdale here, north Fort Lauderdale, progresses through Pompano Beach. Let me take that back. It begins in the Pompano Beach area, proceeds north into Delray Beach in Palm Beach County and, again, up—on a narrow path—up through Palm Beach County into West Palm Beach, west—once you get to the city of West Palm Beach, the district proceeds west and from there into the Everglades agricultural area and then north into Fort—I believe ultimately ending in—ultimately ending in Indian River, Vero Beach.

Q All right. Just so that it's put in proper perspective, that is this pink district that you describe?

A Pink district, 28, yes.

Q And it goes all through that pink area all the way over here; is that correct?

A Goes west to Fort Myers; yes.

Q Okay. And going back to—well, first of all, on this one, you have your coastal communities where one side of the street is in district 31 and the rest is in—the other side of the street is in 28; is that correct?

A That's correct.

Q And which runs how many miles?

A Oh, golly. I've never measured the distance.

[171] Q Well, do it for us.

A From—

Q Another ten?

A Yeah.

Q So, twenty, plus seven and a half, plus ten; thirty-seven and a half miles; is that correct?

A Based on our quick calculation here.

Q Okay. Now, sir, would you show us and walk us through 275, which is the De Grandy plan; is that correct?

A That's correct. And it's a very similar approach, as I discussed earlier. You have got an African-American majority seat containing areas of—this one actually goes into north Miami, south through Liberty City and Overtown and then along a narrow, narrow path—this one picks up the black—what's referred to as the Black Grove or the predominantly black area in Coconut Grove—in the Hargrett, Reaves and Brown. I believe that that area was bypassed; yeah, it was—and then south into Richmond Heights, Homestead and Florida City.

Q That's what you described previously as approximately a fifteen-mile stretch on the HR&B plan; is that approximate?

A That would be correct, yes.

* * * *

[177] A That's correct. And there are significant areas, primarily Windwood, Allapattah, the area south of Opa-locka, Opa-locka itself and northwest Dade County where you have large numbers of both or large proportions of both Hispanic and African-American persons.

* * * *

[179] And the—what's interesting about this map, if I could put the Florida plan back on the easel here: What you see in the Overtown, Liberty City, Windwood area is that most of that territory, most of those people, are included either in the African-American access district or —which is district 40—or in the African-American majority VAP district, district 36.

In the plan 180, what we find is that large numbers of these persons in mixed neighborhoods, in Windwood, Overtown—Windwood and Allapattah, primarily, are in the Hispanic district, district 35.

* * * *

[180] A The same thing occurs, by the way, in the area I referred to earlier south of the Opa-Locka Industrial park. In plan—in the Florida plan, district 36 includes that mixed neighborhood. In the Hargrett, HR&B plan, that area is included in a Hispanic district.

Q That is this purple area here (Indicating)?

A It's tract number 9.01 and 9.02, portions of those two tracts.

Q Okay. So, those Hispanic voters, which are approximately what percentage in each of those districts—black voters? Excuse me.

Tell us the percentage of black and Hispanic voters in each of those districts

A Oh, in the districts.

Q The ones that you just menitoned.

A The tracts, the two tracts?

Q Yes, sir.

A Okay. Okay. Track 9.01 is 26 percent African-American and 69 percent Hispanic voting age. Track

9.02 is 50 percent African-American and 47.8 percent Hispanic. Between the two of them, it's about thirteen thousand six hundred people.

Q And in the Senate plan, this purple, No. 40, is part of—this is part of No. 40, which you identified previously?

A Those two tracts actually are in district 36, yes.

Q Okay, good.

* * * *

[182] Q —how De Grandy did the same thing? Would you explain to the Court exactly what that shows?

A I don't want to take a whole lot of the Court's time.

Q Don't be repetitious. Just tell us to the extent that it's the same, just say it's the same and to the extent that there is any difference at all, tell the Court what it is.

A Well, in both instances—in both instances, the concentration of African-Americans known as the Black Gables is left out of the south district. In the De Grandy plan, the area known as the Black Grove is included. In the Hargrett, Reaves and Brown plan, the Black Grove is excluded from the African-American majority VAP district.

The two plans indicate similar—and, here again, the mixed neighborhoods of Windwood, Allapattah, south of Opa-Locka and northwest Dade County, are put into the Hispanic district [183] instead of being put into the African-American district. The reason they do that is that there are, presumably, is that because there are a limited number of Hispanic persons in Dade County. And in order to accomplish super majority in more than three districts, they took the approach of putting the mixed areas into the Hispanic districts instead of putting them into African-American districts.

Q What does the Senate plan do?

A The Senate plan puts those mixed areas, by and large, into African-American districts. Again, the statis-

tics, the overall statistics for Dade County is that seven percent, in the Senate plan, seven percent of the non-Hispanic blacks who live/reside in Dade County are voting age population, are in a Hispanic district; with the HR&B plan, it is twenty percent; for the De Grandy plan, it is twenty-three percent.

Another interesting point is that white, non-Hispanic white persons in all three of the plans are being left out, if you will, or—I want to be careful to keep my comments factual here. In the Florida plan, 52 percent of the non-Hispanic white voting age population is in a Hispanic or an African-American majority district. In the Hargrett plan, that number is 70 percent. In the De Grandy plan, the number of non-Hispanic whites in Hispanic or black districts is 72 percent.

* * * *

[185] A We touched on this earlier in describing the ripple effect. The fact that this—the choices made in both the De Grandy plan and the Hargrett, Reaves and Brown plan to include African-American, the mixed African-American Hispanic communities in Hispanic districts, together with the—in the case of the Hargrett, Reaves and Brown plan, the higher African-American VAP majorities that were achieved in South Florida result in the population in Fort Lauderdale needing to be used in order to create the second district in Dade County.

In both instances, the Broward County portion of that district is, I believe, two-thirds. The district is two-thirds in—well, actually, for the De Grandy plan district, 32 is two-thirds in Broward County and one-third in Dade County. It's a 57.1 percent African-American VAP.

In the Hargrett plan, district 32 is approximately 45 [186] percent in Broward County, 55 percent in Dade County. It has an African-American VAP of 58.8 percent.

Because the Fort Lauderdale area is not available for a district as it is in the Florida plan going from Fort Lauderdale to West Palm Beach, including just those two urban centers, in order to create a third access African-American district, it is necessary to—in order to get the numerosity that you need for a third African-American access district to go in one case to Melbourne, in another case to Vero Beach and west to Fort Myers.

And that's not to say that this is the only way of solving the puzzle, if you will. The suggestion is that you can only count—first, in redistricting one of the fundamental rules, you can only count persons once. If you count them—if you include a person in one African-American district or one Hispanic district, be that person white, black, Hispanic or whatever, you cannot use that person again.

* * * *

[191] JUDGE HATCHETT: You may have answered this at least once but I want to make sure. Out of all of the plans that you viewed, did you view any plan that drew VAP majority black districts solely within Date County, more than one VAP black [192] district solely within Dade County?

MR. ZACK: Your Honor, the question has to—I mean, respectfully, has to ask and four Hispanic districts. You understand? You can do anything if you don't have to worry about anybody else. So, I think the Court wants—

JUDGE HATCHETT: I asked him did he see such a plan.

THE WITNESS: I don't recall—

MR. ZACK: I just—

THE WITNESS: I don't recall having seen any such plan. The plan that was—do we want to just have a conversation here?

MR. ZACK: That's what it is. Just tell the Court what you know.

JUDGE HATCHETT: Yes, go ahead.

THE WITNESS: The plan that was proffered by the NAACP earlier in this proceeding has two African-American VAP majority districts, which are mostly in Dade County. One of them extends into the Cutler Ridge

area in south Broward, but it does not extend up as far as Dania or I don't believe it gets into Dania. I'm sure that it does not go into the urban center of Fort Lauderdale.

BY MR. ZACK:

Q Does that map have only three Hispanic super majority seats?

A Yes.

[193] MR. ZACK: Thank you.

JUDGE HATCHETT: Thank you.

JUDGE STAFFORD: Now, Mr. Zack posed a question. Following up with what Judge Hatchett asked you: Have you seen any plan that creates four Hispanic VAP, not necessarily super majority, but four VAP's expanding district solely within Dade County?

THE WITNESS: Both the De Grandy plan and the Hargrett, Reaves and Brown plan include territory in Broward County in order to fill out their Hispanic district. So, I can't recall having seen one that has four Hispanic majority. Without saying whether it could be done or not, I have not seen it.

JUDGE STAFFORD: On those that got into Broward County, did they also include two black or African-American VAP, majority districts, in the same area?

THE WITNESS: Okay. The Hargrett, Reaves and Brown plan has one African-American VAP majority district wholly contained in Dade County. It has a second one which extends north into Fort Lauderdale, as I said earlier.

JUDGE STAFFORD: Yes, sir. Thank you.

THE WITNESS: Also, the De Grandy plan, the second Hispanic district extends north to Fort Lauderdale.

JUDGE STAFFORD: Thank you.

MR. ZACK: And the percentages of Fort Lauderdale?

[194] THE WITNESS: In the case of the Hargrett, Reaves and Brown plan—

MR. RUMBERGER: Judge, that's repetitious. We have been over that a number of times.

JUDGE STAFFORD: I think I—

MR. RUMBERGER: Two-third, one-third, forty-four percent on the other.

JUDGE STAFFORD: I think I asked him some questions. My apologies to my brethren here.

JUDGE HATCHETT: Well, this one may be repetitive, also.

MR. ZACK: Did you say he may answer?

JUDGE STAFFORD: I think I've got it.

MR. ZACK: You've got the answer; fine.

JUDGE HATCHETT: Yes, he has the answer. I have a question, though. From all of your experience working in South Florida, is it possible to draw four VAP majority Hispanic districts and three majority black districts?

MR. ZACK: Your Honor, may—it has to be—I want —the Court is asking for VAP, I'm sure; right?

JUDGE HATCHETT: Yes.

MR. ZACK: And there is no question—well, you want—the question of electable black Hispanic seats or not? You answer the question as you understand it.

THE WITNESS: It's amazing, Your Honor, what you can [195] do with these computers. And I'm not aware that any such plan has been submitted either to this Court or in any other legal proceeding or during the legislative process which did that.

If you ask me would I believe that you could do it, I would believe that. But it gets to the notion of—because of numerosity—of how thin you're willing to cut your margins on both the African-American and the Hispanic seats, cutting them down to a bare VAP majority in order to accompilsh that.

JUDGE HATCHETT: You've answered my question.

* * * *

[196] JUDGE HATCHETT: Overruled.

BY MR. ZACK:

Q Please answer that.

A Wholly in Dade County, I do not believe it's possible, no.

Q And even doing, going a little bit into Broward, you couldn't go and get four sixty-five percent seats?

MR. RUMBERGER: Objection; leading.

BY MR. ZACK:

Q And two black VAP's; isn't that correct?

MR. RUMBERGER: Objection; leading.

JUDGE HATCHETT: Overruled.

BY MR. ZACK:

Q Answer the question.

A No, I don't believe you could; no.

* * * *

CROSS EXAMINATION

BY MR. BURR:

Q Mr. Guthrie, is it a fair statement that in attempting to [197] accommodate the interest of Hispanics and blacks in Dade County in drawing Senate districts, that there is a ripple effect northward at least into Broward and Palm Beach Counties?

A I would like to answer it—yes, and I would like to answer the question this way: That the Florida plan provides two majority African-American districts in Dade, Broward and Palm Beach Counties and a second African or a two majority VAP, a third district which has a 35.5 percent African-American VAP in an area where we have seen—we have a record of crossover voting that would enable an African-American candidate of choice to win election.

That district, by the way is in the vicinity of—let me give it to you exactly. That district is—

JUDGE HATCHETT: 40; right?

THE WITNESS: It's district No. 40. I'm looking up the Hispanic VAP on that district. It's 22.9, but, as I testified earlier, there was testimony at the south Dade public hearing that the Hispanic-American community in South Florida saw itself as being more closely aligned with the African-American community than with the downtown or the urban Hispanic community.

So, if you want to maintain that level of African-American representation or opportunity in South Florida, it will be necessary if you create four Hispanic districts to push one—to create an additional African-American district that [198] goes beyond, I believe, what's on this.

* * * *

Q All right. Now, focusing on those three counties—Dade, Broward and Palm Beach—I would like to ask you first a question about Reaves, Brown and Hargrett.

A Okay.

Q Now, in the Reaves/Brown/Hargrett plan, how many black districts are there that are located either wholly or in part within those three counties?

A Two, two African-American majority VAP districts.

Q And another—okay. And another black access seat that is located partially in Palm Beach and partly outside Palm Beach; [199] correct?

A Mostly outside, I think, yeah.

Q Now, is that also true with the De Grandy plan?

A With the Hargrett, Reaves and Brown plan, the access seat, it's a 47.1 percent African-American VAP district. And it extends through nine counties. Okay. The Palm Beach portion of that district is—well, I misspoke. One hundred and seventy-five thousand total—one hundred and twenty-six thousand of two hundred and twenty-eight VAP is in Palm Beach.

For the De Grandy plan, district 24 is 35.2 percent African-American VAP. It extends north to Brevard

County, crossing seven counties all together. And the Palm Beach portion of district 24 is—it's one hundred and sixty-four thousand VAP out of two hundred and thirty seven total VAP in that district.

Q Okay. So, what we have in both plans, we have two black—two seats that have at least 50 percent or greater black VAP in Dade and Broward Counties and we have a third influence black seat or an access seat that covers a large number of counties, a substantial number of counties, six, seven, eight or nine counties?

A Seven or nine counties.

Q Seven or nine counties; isn't that correct?

A Yes.

Q Okay. Now, if there is not—

[200] A I'm listening. I was checking my seven and nine. That is correct.

Q Now, if a fourth Hispanic seat is not created in Dade County, is it not possible to create three black districts in Dade, Broward and Palm Beach Counties exclusively contained within those counties that have a 50 percent or greater black VAP?

A I am not aware of—well, let me think.

Q Is that not exactly what was done in the plan that was tendered to the Court yesterday referred to as the Burke/Wallace plan?

MR. RUMBERGER: It was not admitted, as I recall, and to which we continue our objection.

JUDGE HATCHETT: We note your objection, Mr. Rumberger. Overruled.

BY MR. BURR:

Q Do you want me to ask the question again?

A I understand the question now. The plan that was tendered to the Court had two African-American majority VAP districts which extended north into Broward County to include the Cutler Ridge area. They did not include the urban Fort Launderdale area.

Q And they were both 50 percent or greater black VAP; correct?

A That is correct.

* * * *

[201] MR. ZACK: I just make an objection for the record that we're now talking about plans outside of Dade County that go all the way to Palm Beach County. I believe that that is not what this—this is a Section 2 matter as to Dade County. So, anything beyond what can be done in Dade County I would object to.

JUDGE HATCHETT: Overruled.

* * * *

[206] MR. HEBERT: That's correct. I did not. And I was going to go back and amend it. Fortunately, I have co-counsel here who are quick to remind me when I make mistakes.

BY MR. HEBERT:

Q If you were told that your instructions from the Court, from your Senate bosses, whoever were to instruct you, to revise the Senate plan to create let's start out with four districts where Hispanics are in the voting age population majority and three districts in which blacks were in a voting age population majority, how long would it take you to draw such a plan?

MR. ZACK: I have no problem with the question if it's confined to Dade County or a specific geographic location. Otherwise, we have no idea what the answer means.

JUDGE HATCHETT: Overruled.

MR. HEBERT: And I don't want you to limit your answer to the population in Dade County. We're talking about South Florida. And by South Florida, I'm going to refer to an area from Fort Lauderdale south as my geographic reference.

MR. ZACK: And, just for the record, I know you want to have this question answered but I need to object

on the basis that this is a Section 2 case involving Dade County. There has been no testimony about communities of interest or [207] any matters concerning polarity, polarization, no polarization testimony, no bloc voting testimony concerning Broward County.

So, for the record I want it to be very clear that this Court cannot go into the Broward County without having the Court finding information which was not provided during the plaintiffs' case in chief.

JUDGE HATCHETT: Overruled.

BY MR. HEBERT:

Q How long would it take, based on your experience, I think you said three thousand plans were drawn on the computers for the Senate?

A Yes. You want to start in Fort Launderdale and include all of Dade and Monroe?

Q No, I didn't say anything about starting anywhere, Mr. Gutherie. I was asking you how long it would take, using Fort Lauderdale as your starting point in Florida and taking every area south of that, including that area. If you were told by the Court draw four Hispanic VAP majority districts and three African-American majority VAP districts, how long on your computer would it take you and your Senate staff to do that?

A The first thing I would advise the Court is that it may be impossible to accomplish that task in any amount of time.

Q How long would it take you to find out whether it was possible or impossible? How long would it take you to generate [208] the maps and the statistics?

A Addressing—that's a—I don't know. I honestly don't know.

* * * *

[209] Q Now, what was the shortest amount of time, the shortest amount of time it ever took you to respond to one of those "what if" questions.

MR. ZACK: Objection, Your Honor. What if what? What if the sky is going to fall down in the next minute and a half, hopefuly a second and a half?

MR. HEBERT: I was trying to use his term.

JUDGE HATCHETT: Overruled.

THE WITNESS: Okay. I can't recall what the easiest "what if" postulate that was ever proposed to me was.

JUDGE HATCHETT: That's fine. You've answered the question.

THE WITNESS: Yes.

I can say that the issue of is it possible to draw four Hispanic VAP majority and three African-American VAP majority districts in South Florida, that is a very difficult question. It's a difficult "what if" postulate because of the [210] complexity of the demography of South Florida. It's not something that I can sit here and just opine. It's something, frankly, that I have given some thought to. And my—I don't have a sense of it at all. My expectation is that it would be very difficult to do that.

JUDGE VINSON: Mr. Guthrie, I'm inferring from your answer that the answer is no within the bounds of reasonable expectations of districts? Is that a fair inference to draw from what you're saying?

THE WITNESS: What I have done, Judge Vinson, from the plans that have been placed before the legislature—and many people have been working on these plans for many months now. And I've got to believe—with several different theories about what we ought to accomplish in redistricting.

And the plans that are before the Court, I think they're responsive to say that that's the best we have got along the way. And nobody yet has accomplished that. Okay. Nobody yet has proposed a plan which has four majority African-American—four majority Hispanic-American VAP districts which they believe—which, and, again, normally map makers are shooting for a super majority VAP with the Hispanic districts and three African-American VAP districts in South Florida.

JUDGE VINSON: Have you tried to do it?

THE WITNESS: Have I tried to do it? No.

[211] JUDGE VINSON: Okay.

JUDGE STAFFORD: Mr. Hebert, let me ask you: Does that question presuppose a ten-percent deviation or are you back to his confine of .4 percent?

MR. HEBERT: I haven't actually focused on the deviation. And the question really could have taken into account either scenario. And maybe I should amend my question and say—if we were to—and I think it's a proper—perhaps he's limiting himself because of the .4 percent instead of being willing to enlarge that.

BY MR. HEBERT:

Q Would your answer make a difference if the deviation were permitted to be as high as eight or nine percent?

A It's an empirical question. And I'm reluctant to guess as to what the answer is.

Q And how many hundreds of hours did you say that you worked on the computers?

All right. Let me see if I can make the question a little easier for you. Again, using the geographical confines of Fort Lauderdale south as the point of reference, how long would it take you, Mr. Guthrie, to draw four Hispanic districts, two black voting age population majority districts, two majority black voting age, four Hispanic population, voting age population, and one what you term black access district? Could that be done faster than drawing three majority black [212] districts? How long would it take you? That's all I'm asking.

A I do not believe that—

Q Assuming it can be done. I'll even concede that. Assuming it's possible to do it, how long does the computer take in your office to draw such a district if this Court orders you to go back to your office and see how long it takes? Give us an estimate of how long that would take you.

A The answer—I think we're trying to make redistricting into a bit easier a process or working on the computers into a bit easier process than I in fact believe it is. Because of the—because the concentrations as indicated by the black and Hispanic maps that we have here, because all of the black citizens or persons don't live within the same area and all of the Hispanic persons don't live in exactly the same area and because when they do live in those areas, in order to avoid getting a very large VAP majority it is necessary to include some outlying areas, what is required oftentimes is actually going in at the block level and making decisions block by block of, okay, how many black persons are in this Census block, how many Hispanic persons are in this Census block. And in terms of the total equation involving three hundred thousand Census blocks, am I going to get a better result if I put this Census block in district A or district B. And the best example is a tract or block which has 40 percent Hispanic VAP.

JUDGE STAFFORD: But all this—

[213] THE WITNESS: Excuse me.

JUDGE STAFFORD: But all of this information is already in your computer; isn't it?

THE WITNESS: It's in the computer.

JUDGE STAFFORD: All you have to do is bring it up?

THE WITNESS: Yes.

BY MR. HEBERT:

Q When was the last time you ever worked on—

JUDGE VINSON: Wait.

MR. HEBERT: I'm sorry.

JUDGE VINSON: I would like to get an answer, though, if you can give it to us: How long would it take?

THE WITNESS: Starting—well, I know that the wishbone-shaped district in Northeast Florida that was proposed by the Senate and was ultimately adopted by this Court, it's a—or in the Florida plan, the district which

goes from Jacksonville down to Alachua County, in both those instances, literally scores of hours were spent crafting that single district in a way to try to create or maintain an African-American opportunity district.

The problem in Northeast Florida is that the urban—and also in Miami—is that the urban core has not kept pace with the rest of the state in terms of population growth. And so in those districts you could add population and adding populate oftentimes means going outside the urban core. The [214] closer the margins are that you're starting with, the more difficult it is to cross the threshold of a 50.1 or a 65 percent or whatever.

JUDGE VINSON: Answer the question. How long would it take?

THE WITNESS: Starting from scratch, it would be—it would take a very, very long time.

JUDGE VINSON: Eight hours? Sixteen hours? Two hours? One hundred hours? What are we talking about? You're not starting from scratch now. You have got a lot you have already got worked out.

THE WITNESS: The—I would guess that it would take ten to fifteen hours to ascertain within a geographic confine whether it was going to be possible. We do not have a good target here yet. If we're talking majority Hispanic VAP, 50.1 percent Hispanic VAP and 50.1 percent African-American VAP and we want four Hispanic and three African-American district, then the other thing that I would have to have as a starting point is how large an area are we willing to look at. Do we want to limit our focus to only Dade and south Broward County? Do we want to go to Fort Lauderdale? Do we want to go to Brevard County?

JUDGE VINSON: Well, he's already said including Fort Lauderdale, Fort Lauderdale south.

THE WITNESS: Fort Lauderdale south, I do not believe [215] it is impossible, given the rest of time, based on the 1990 Census figures to create two—well—three African-American and four Hispanic VAP's—

JUDGE VINSON: No, he asked you two black districts, one access district, plus four Hispanic districts, all with a VAP majority.

THE WITNESS: Assuming that access is greater than 25 or 30 percent, I don't believe that you can have two black African-American majority, one African-American access and four Hispanic VAP majority districts in that area. I don't believe that it's possible.

MR. BURR: Your Honor, if I could just make a brief statement. I know this is little irregular. And this is information that is not in the witness' knowledge, but I believe the Court obviously is struggling with trying to get to a solution.

JUDGE HATCHETT: Well, we don't ordinarily have people just stand and give speeches. Could you communicate with your co-counsel there and have him put it in some type of a question?

MR. BURR: Yes. I'm trying to assist the Court. I will be happy to be quiet.

JUDGE HACHETT: Find some other way of doing that rather than simply standing up and testifying.

MR. ZACK: Your Honor, may I make a suggestion?

[216] JUDGE HATCHETT: Yes, Mr. Zack.

MR. ZACK: I don't believe this Court should have a plan that wouldn't have been precleared. In preclearance we were told that 65 percent, 64.3 was the minimum that would be precleared upon a Hispanic seat. For this Court to ask questions of a 51 percent VAP Hispanic seat wasn't even passed preclearance by the Justice Department. I would ask the Court to—in order to help the Court understand what is possible here—to pose the question in terms of electable seats as Gingles requires. I would ask the Court to do that.

JUDGE HATCHETT: We have heard you, Mr. Zack.

MR. ZACK: Thank you, Your Honor.

MR. HEBERT: May I proceed?

JUDGE HATCHETT: Yes, you may.

MR. HEBERT: For the record, Mr. Burr simply wanted to bring to the Court's attention the fact that last night he and his parties drew a plan for the South Florida area that did exactly what I think my question proposed and did it last night.

MR. BURR: Not quite, almost but not quite. We limited it not to Fort Lauderdale south but to the three-county area.

MR. HEBERT: Which is—

JUDGE HATCHETT: Palm Beach, Broward and Dade?

MR. BURR: That is correct, Your Honor. And I have [217] given the results of that effort to Mr. Hebert. And all I can say is that based on our experience it is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable. And that effort took approximately ten hours.

JUDGE HATCHETT: Thank you.

He agrees with you, Mr. Zack.

MR. ZACK: I better sit down.

By MR. HEBERT:

Q You indicated a few moments ago that—when you were describing the third access seat for African-Americans, you said that assuming that third access seat would be 25 to 30 percent black, I think you said?

A Right.

Q So, you defined a black access seat as being one that's 25 or 30 percent?

A I tried to limit my—my role is or has been more providing technical decision support to members rather than legal opinions. So, I don't—I was using that really to frame the question rather than to indicate what my belief is as to what makes an access seat.

Q So, for purposes—

A I would rather—

MR. ZACK: Let me object to the issue of what [218] constitutes an access seat because you would not let him testify as to any legal opinion on direct. We would love to get into a lot of legal opinion, but I object to any legal opinion being asked.

JUDGE HATCHETT: Rephrase your question.

MR. HEBERT: Sure, and I don't want a legal opinion. The reason I brought up the word "access" is that was the witness' answer in response. And I simply wanted to pursue what he meant by that. I agree. He is not an expert.

BY MR. HEBERT:

Q In your answer then, you were using "access" purely as a statistical reference in the sense of saying that any district 25 to 30 percent black or greater, you were just determining that an access seat without regard to the political effectiveness of that seat; is that what you answered?

A It really had more to do with numerosity. And just running the numbers through in my head as you pose the question, I took Fort Lauderdale south, knowing what I know about the distribution of the population. And the answer was that I don't believe there would be two majority seats and an access seat.

Q The De Grandy proposed Senate plan that you gave us some testimony about, isn't it a fact that it creates two black majority VAP districts over 60 percent and a third district that is over 40 percent black in VAP?

A The De Grandy plan has two districts that are right in the [219] vicinity of 57 percent VAP. One is 57.1 percent in Broward and Dade Counties. The other is 57.3 percent in Dade County.

Q You are correct. I gave you population statistics and I apologize.

A And then the access seat or the so-called access seat in the De Grandy plan is district 24, which has an African-American VAP of 35.2 percent; that district goes

through Palm Beach, Okeechobee, Henry, Martin, St. Lucie, Indian River and Brevard County.

* * * *

TESTIMONY OF LISA HANDLEY

TR VOL. VI

* * * *

[185] At the commencement of the portion of the trial having to do with the Senate case we moved into evidence, proffered NAACP Exhibit 1, and at that point it was not made, it was made a part of the record but not received in evidence.

At this point Mr. Guthrie has testified about it. NAACP Exhibit 1 has referenced it. I believe Representative Logan has testified about it, certainly the last witness has now testified about it and explained it, and it is an essential component of the NAACP's case.

Iwould not, if this case goes up on appeal, I [186] want it to be clear what the NAACP's case consisted of, and we are left with a lot of testimony about a document that is the heart, as a matter of fact it is the only part of our case that is not formally received in evidence, and I would proffer it at this point and ask that it be received.

JUDGE HATCHETT: One minute.

MR. BURR: It is the NAACP's Section 2 case.

JUDGE STAFFORD: What is that exhibit?

MR. BURR: That is the, it is the Burke-Wallace plan for the Senate.

JUDGE HATCHETT: You may have very short argument on this matter. We are—

MR. BURR: Well,—

JUDGE HATCHETT: Not you, Mr. Burr, the people I assume who are going to—(laughter)—people I assume who are going to object to it. I assume you are going to object?

345

MR. GREGORY: Mine is very brief, Your Honor. My recollection was this Court ruled that should we get to remedial stage that you would then consider the plan if necessary, but other than that the Court was going to deny it being introduced into evidence.

I don't see that there is any prejudice because if we don't get to remedial stage, it's academic if we [187] do, it might be considered at that point, so I would ask the Court merely to reaffirm its earlier ruling.

JUDGE HATCHETT: Mr. Cardenas?

MR. CARDENAS: Yes, Your Honor, I would certainly agree with counsel. Our spirit is that all doors are open at the remedial stage, but bear in mind our objection for it to be submitted into evidence at this point stems from two reasons.

One, the issue that was covered at the very outset by Your Honors in terms of the fairness or the timeliness of the document. The other and most prevailing argument was while counsel decided on his, to propose his or agree with the motion for a directed verdict against the plaintiffs in the case, at that point in time something happened in my opinion which in essence makes this document not introducible by plaintiffs in this case since we are dealing with the State Senate, and there has been a motion for a directed verdict made by the NAACP in the matter, and from those, from those grounds primarily we would object to its submittal now.

As we said, we certainly agree that if we get to a remedial stage there, their input is very valuable, and we would agree with that, but certainly at this stage it doesn't make any sense.

[188] MR. BURR: May I respond briefly?

JUDGE HATCHETT: We don't need any response.

MR. BURR: Okay.

JUDGE HATCHETT: Government—NAACP Exhibit 1 will be admitted into evidence.

(Whereupon, the aforementioned document was received in evidence as NAACP Exhibit Number 1.)

JUDGE HATCHETT: As far as we know now that completes the Senate evidence except for the matter that Mr. Zack discussed earlier a few minutes ago.

MR. ZACK: And reserving anything that the Senate, the House doesn't cover by other witnesses.

JUDGE HATCHETT: Right.

MR. ZACK: I want to be clear for the record, the NAACP submission is their submission, and I have taken it in effect out of order in the Senate's case.

JUDGE HATCHETT: Yes.

MR. ZACK: All right, sir.

JUDGE HATCHETT: Yes. The Court at this point would like to entertain and hear argument regarding the proof in this case as to the Senate side of the case,

* * * *

[244] Q All right. Dr. Handley, I show you what has been marked for identification as House Defendant's Exhibit 19.

Would you identify the document?

A That's the affidavit we prepared for this case.

Q Okay. How are you employed, Dr. Handley?

A I'm sorry?

Q How are you employed?

A I am Senior Research Analyst, Election Data Services, a political consulting firm in Washington, D.C.

Q And your educational background?

A I have a Ph.D. in Political Science from George [245] Washington University.

Q You have previously qualified and testified as an expert in this matter?

A Yes, I have.

Q On the subject of?

A Voting rights, I guess, generally speaking, redistricting.

Q Congressional case subject—

A Yes.

Q What tasks were you requested to do by the House in this part of this litigation?

A I had two major tasks. The first one was to do a racial black voting analysis and to prepare a draft report for the House of Representatives; and the second was to look at the viability of minority, proposed minority districts and the alternative plans put forward.

Q Briefly, briefly describe the racial bloc voting analysis which you conducted.

A I looked at all statewide congressional and state legislative races in the State of Florida from 1986 on that included a minority candidate, looked at six major urban areas in local elections and what we have identified as six major urban area counties some local election returns in those areas.

I used the two standard techniques that have [246] already been described to the Court, bivariate ecological regression analysis and homogenous precincts analysis to do that.

Q What, why two standards? Why two methods?

A The two are complementary of each other. For example, homogenous precinct analysis you wouldn't want to use alone because it only looks at homogenous precincts, and in case voting behavior is slightly different in precincts that are heavily segregated versus precincts that are integrated, you would also want to look at ecological regression analysis which considers all precincts.

Q Then the type of population of a district would determine to some extent the type of analysis you do?

A Well, it's true that sometimes you can't do a homogenous precinct analysis because you don't have homogenous precincts that are precincts that are 90 percent black, white or Hispanic.

Q Were you able to reach any conclusions based upon this analysis, and if so what?

A I found that generally speaking voting did tend to be polarized in Florida, that participation rates were low for minority groups, especially were lower for minority groups than for whites, especially Hispanic turnout rates. That both of those things varied by areas of the state and by district.

[247] Q For example, very, what area of the state, where was it particularly low or particularly high?

A For example, in, well, the only place I could get good Hispanic estimates were in Dade County, but I found that some districts, in some districts Hispanic turnout tended to be even lower than the statewide average for Hispanic turnout.

Q In fact, the area that we asked you to take a look at was Dade County.

A One of the areas that I was asked to look at was Dade County, that's correct.

Q All right. With reference to that area, Dade County, did your analysis reach any particular conclusions as to that area of the state?

A Yes, generally speaking voting was polarized in Dade County. Whites tended to vote for white candidates. Hispanics tended to vote for Hispanic candidates, and blacks tended to vote for black candidates.

They also found that whites turned out at the highest rates, blacks at the next highest rates and Hispanic turnout was considerably lower than both of those groups.

Q Do your findings have any implications to the drawing of minority districts in Dade County?

A The fact that minorities turn out at a lower rate means that you need to draw districts that are greater than [248] 50 percent black or Hispanic VAP, particularly in terms of Hispanic population. Because turnout was so low, in order to draw effective minority districts you had to put them at considerably above 50 percent Hispanic VAP.

Q For Dade County how much greater is required for—

A That varied considerably by district. That's exactly the reason that you needed jurisdiction specific analysis. I looked at each district separately.

Q Why would it vary by district?

A Hispanic turnout rates were not consistent across all of Dade County. There are some districts in which

you may find low Hispanic turnout because you included, for example, oops, it's that "N" word, more non-citizens than other groups, but that's why—

Q Did this kind of analysis for any proposed minority districts—

A I'm sorry?

Q Did you do that type of analysis for any proposed minority districts?

A I did this analysis for all proposed minority districts. That is all districts actually 30 percent or greater black or Hispanic.

Q In Dade County?

A In Dade County.

[249] Q What did this entail, the analysis? What did you do?

A To determine the effectiveness of the district?

Q (Nods affirmatively).

A The analysis was actually two-fold. What I did was I looked at all districts with 30 percent or more minority population, and if the district was, for example, 65, 67 percent Hispanic or greater, and recompiled election returns that I looked at determined that the minority preferred candidate would have won in both of the races for which I had recompiled election return with minority preferred candidates, I determined automatically that that district was safe.

Q Say that again. I'm sorry.

A Okay. I did a two-fold analysis.

Q I heard that part.

A Okay. The first run through I identify, I should say that I did this a lot, I looked at literally hundreds of minority districts, and in determining whether a district was safe or effective or not, it quickly became apparent that every district over 67 percent Hispanic which recompiled election returns indicated that the Hispanic preferred candidate would have won in both of the contests that I had to look at. Then I classified that district as safe.

[250] In terms of black districts, if the black VAP was 57 percent or greater, and the black candidate won all

of the elections, statewide elections that I had to examine, then I classified that district as safe.

At that stage then I went to all of the other districts, and did a more indepth analysis of all of the remaining districts. I looked at things like the minority voting age population of districts. I looked at the partisan makeup of the District. I looked at, again, recompiled election returns for that district.

Q What is recompiled election returns?

A I took some statewide contests in which I knew that black preferred candidates and Hispanic preferred candidates had run, and what we do is we recompile the precinct returns up to the new district level to determine if that candidate would have won in the newly configured district.

Q Why do you recompile it? Why is that?

A Why do we recompile?

Q Yes.

A To determine if the minority preferred candidate could win in the new district.

Q Okay. What conclusions were you able to reach based upon this analysis?

A Well, actually let me finish the rest of my [251] analysis.

Q All right.

A I mean, I looked at, like I said, the partisan makeup. I looked at recompiled election returns. I also looked at turnout rates. I also looked at the degree of minority cohesiveness in the district. I looked at the degree of white crossover vote I might expect in the districts. I looked to see if there was a minority incumbent sitting in the district, all of those things went into my analysis.

Q Did you find that Hispanic voters are as cohesive as black voters in Dade County?

A No, black voters were more cohesive than Hispanic voters.

Q In fact the contrary is true?

A I'm sorry?

Q The contrary is true in Dade County? Hispanics are more cohesive than black voters?

A No, black voters are more cohesive than Hispanic voters.

Q Thank you. Okay. What is your definition of an effective, effective minority district?

A An effective minority district is a district in which it's likely that a minority preferred candidate could win. [252] But let me further say that there are degrees of effectiveness. As Dr. Lichtman pointed out in his testimony on Saturday, in fact, he said that, well, he called them safe and later on he called them rock solid districts, that is districts in which you are almost certain a minority candidate would win versus competitive districts, that is districts in which minorities are provided an equal opportunity or possibly a realistic opportunity to elect a minority preferred candidate.

Q So that the types of the effective districts are what and what?

A Safe and competitive.

Q And safe is rock solid and competitive is—

A Equal opportunity, that's correct.

Q Under your standards, your analysis, is it possible in this criteria to have a district with less than 57 percent black VAP or less than 67 percent Hispanic VAP would that district be classified as safe?

A Yes, certainly. The districts that were over 67 percent black VAP that had recompiled election returns that indicated the minority preferred candidate would have won were automatically classified as safe, but certain districts had fell below that level could be classified as safe.

In order to be classified as safe a district had to, had to be able to tell, first of all, that recompiled [253] election return had to indicate that the minority preferred candidate would have won all of the elections I examined.

Second of all, turnout rates had to indicate that the minority would be at least 50 percent of the voters on

election day; and third of all, I had to know that the minorities were, in fact, cohesive in that district in order for the district to be classified as safe.

* * * *

[257] Q Sure. Under your analysis where you have calculated out the number of effective minority districts, you actually find more effective minority districts under Reaves, Brown, Hargrett in the De Grandy plan than there are total number of districts under the State's plan?

A If you combine safe and competitive that's correct.

* * * *

[258] Q Let me move on.

The language that you employed to describe a competitive district, and I believe in the report that I showed you a copy of a moment ago you have a definition which I would like you to read out loud for me, one sentence, into the record which actually includes a definition of safe and competitive, and it's listed right, right here on this Exhibit 13.

If you could read that for me, "Districts" that is where it begins.

A "Districts that are almost certain to elect [259] minority preferred candidates are referred to as safe districts, while districts that provide minorities with an equal opportunity to elect candidates of their choice have been referred to as competitive districts."

Q The last segment of the definition on competitive to an equal to elect candidates of their choice?

A That's correct.

Q Isn't that almost verbatim the language out of the Section 2 of the Voting Rights Act?

A That is where I got it.

Q Thank you.

* * * *

TESTIMONY OF THOMAS HOFELLER

TR VOL. IV

* * * *

[67] me as sufficiently large and compact, I think about it in the geographical context which means to me that we are really talking about whether or not the northern community itself is sufficiently large and compact in order that districts can be drawn which will allow them to elect candidates of their choice.

Once you determine that, then you may draw districts that will allow that to happen, given the distribution of population within the districts. But particularly within the Florida context, I think that again you want to have a district which is manageable politically.

* * * *

[69] A I think that when you are talking about size, you are talking about geographic size rather than population. Obviously, all the districts would be the same size with regard to population. One sees in all plans districts which range over large geographic areas. Some of them are regularly shaped, some of them are irregularly shaped.

So if you are talking about largeness in terms of geographic area, one would be talking about the length of the district, the width of the district, or one would be talking in some sense about again the manageability of the district with its size. For instance, does it go into a large number of media markets, does it range out over a large number of different types of communities? Would it be very difficult to campaign? So if—if those objections are not really there, then it would be sufficiently compact and would not be too large.

* * * *

[85] Q And my point is that once proportional representation has been made, do you then have that element of the compactness consideration removed from the consideration?

MR. RUMBERGER: Judge, I would object. We are not into that aspect of this at all. It surely exceeds cross-examination—or direct examination.

JUDGE HATCHETT: Overruled. Doctor, you may answer the question.

A I—I personally don't believe that proportionality is a limit either way. It isn't a limit on the upper limit or isn't a limit on the lower limit of the number of minority seats you would build. If that were the case, for instance, if you were to follow what I believe is your line here, we wouldn't have three black congressional districts in Los Angeles, we wouldn't have three black congressional districts in Chicago.

Q My question, though, was it a consideration. I didn't ask was it a bright line.

A I think it's a passing interest, but I don't think it should be used at all as a criteria for determining the number of seats. If you're going to determine the number of seats, you should determine it for the plan as a whole. Where you draw them has to do with where it's possible to draw them.

Q So you assign relatively little values to the fact a [86] particular minority has achieved proportional representation?

A If you were talking about the—

Q Please answer yes or no.

A I—

MR RUMBERGER: Do you need some elaboration?

A I can't answer that question yes or no, because—

Q Isn't it true by your last statement that you place little value on the fact that a minority group has achieved proportional representation in the context of your definition of compactness?

A If you're talking about the plan as a whole—

Q Please, yes or no.

A I—I can't answer that question yes or no.

JUDGE HATCHETT: Answer the question the way you can answer it.

BY MR. CROWLEY:

Q Yes or no and then you can explain.

A Yes.

JUDGE HATCHETT: He has a right to answer the question. I think he's done it about three times.

Answer the question.

A If you're talking about using proportional representation as a standard for determining how many seats the Hispanics should get in Dade County, then I would say the answer is no.

If you're asking is proportionality important as to [87] how many seats the Hispanics are getting in the Florida plan as a whole, I would say, yes, it would certainly be a consideration.

BY MR. CROWLEY:

Q That's certainly an answer, though, that doesn't address compactness, does it?

A We aren't talking about compactness, we are talking about proportionality. I think they are two different topics.

Q I want to know how proportionality relates in your mind to Dade County, since you have done an eyeball study. Please limit your answer to Dade County.

A How it relates in what way?

Q In the relationship of drawing the appropriate number of districts in Dade County, given that they have proportional representation under the Florida plan.

A I think in regard to drawing the appropriate number of seats in Dade County for a statewide legislative plan, it has no bearing.

* * * *

[105] If you would, please compare and contrast the plans and their impact in African-American electorates in Dade County.

A Okay. Thank you.

Q Based on your personal knowledge and experience?

A Yes. What we were simply trying to do is make certain that every possible district that could be created that would elect an African-American was created. At the same time we knew we had—there is a —see, once you go down to the south area, which runs from South Miami to Richmond Heights, [106] Perrine, Florida City, Homestead and some other areas where there are solid black comunities—for instance, Richmond Heights is a community where blacks have created this community, and so it's been a very strong, very solid black community, middle class. And we want to make sure that those persons as well had an opportunity of continuing in having a black representative, regardless of the person. And so we worked diligently to get that district up by combining those communities. And we got it up to a safe 38.8 percent district.

Q Now, does the Reaves, Brown plan or the De Grandy plan have an adverse impact on the African-American population in Dade County?

A Without a doubt. In fact, it has a progressive impact on those communities.

* * * *

TESTIMONY OF ALLAN LICHTMAN

TR. VOL. III

* * * *

[5] MR. MEROS: If I may just address one procedural matter? Just this morning the De Grandy plaintiffs have filed with the court and served copies on the other parties of a motion for leave to file voluntary dismissal under 41(a)(2) with respect to House districts outside of Dade and Escambia County.

* * * *

[12] Q Now, we are going to actually get into the declaration sworn statement affidavit that you have executed. What I want to ask you, doctor, is what were you asked to do in this case?

A I was asked to examine the materials in the record in this case, particularly materials prepared by defendants, their experts, and their consultants, with a mind to examining how [13] those materials affected a number of issues, in particular, racial bloc voting, with a focus on minority cohesion, and white bloc voting in the Dade County area, and particularly involving Hispanics.

I was asked moreover to make an assessment of the extent to which such racially polarized voting, if any, affects the opportunities of minorities, specifically for Hispanics to elect candidates of their choice in various districts, both with respect to the state's plan and any possible alternative plan designed to provide Hispanics greater opportunity.

I was also asked to assess whether potential alternative plans to provide greater opportunities for Hispanics had an impact upon black opportunities within Dade County to elect candidates of their choice.

Q Now, you have used a couple of terms and I should have asked you to do these before I asked you your charge here in this case, but you used the term "cohesion and racially polarized voting." Would you briefly define those terms as you used them?

A Yes. Racially polarized voting simply refers to the extent to which minorities and whites or the Hispanics and nonHispanics, as it is in this instance, tend to support different candidates of choice. Such racially polarized voting can become politically significant if it has an impact [14] upon the ability of minorities in a given context, like in this particular plan here to elect candidates of their choice and to participate fully in the political process.

JUDGE VINSON: Are you including racially polarized voting with Hispanics.

THE WITNESS: It could be Hispanics. It could be blacks. I'm equating it with any minority group, that's correct. We call it ethnically polarized or racially or ethnically polarized—

MR. WAAS: Your Honor, if I may? For the record, let me pose an objection to this testimony. Since he declared what his testimony is going to be, we believe that that testimony is improper expert testimony. He's done no analysis on his own. He's prepared no reports. As I understand his testimony. He's going to take the report submitted by others, the expert analyses done by others, run them through him, and he's going to say what's wrong with them.

JUDGE VINSON: He's in the nature of what you call a summary witness.

MR. WAAS: Exactly.

JUDGE VINSON: That's allowed under the circumstances of this case, particularly. That's overruled.

THE WITNESS: Shall I continue?

BY MR. HEBERT:

Q Would you please finish up for us?

[15] A And really racially polarized voting or ethnically polarized voting breaks down into two parts. The first part we generally call political cohesion. And that refers to the minority side of the coin, the extent to which minorities unite behind candidates of their choice; and then the opposite side of the coin is generally referred to as bloc voting, the extent to which another group units behind different candidates of choice. And one is trying to make an assessment here of the extent to which minorities are cohesive and in turn to which other groups bloc vote for different candidates.

Q And your definitions are set forth in Paragraph 4 of Government Exhibit 46, are they not?

A They are.

Q Now, what information—you said that you had studied reports prepared by experts for the State of Florida.

MR. HEBERT: If I might, for the court, for the benefit of the record, let me state that the documents that Dr. Lichtman relied on were in evidence in the con-

gressional case. So these are documents already in evidence before the court.

BY MR. HEBERT:

Q Dr. Lichtman, what information or data in those expert reports did you study?

A There is considerable information in those expert reports bearing upon the issues that I mentioned. First of all, there [16] are considerable bodies of analyses of voting by the various demographic groups within Dade County, specifically Hispanics, blacks and whites. Those studies utilize the two standard techniques in the field for assessing voting behavior, namely ecological regression analysis, an extreme case, or homogeneous precinct analysis.

In addition, there is, of course, the straight demographic information on the composition of the district in the state's plan and various alternatives, and there is also what we call recompiled election results. That is to take the results of elections involving minority candidates and compile those elections to the particular precincts within particular districts and thus come up with an assessment of if an election had been held only within a certain district, what would have been the results of that election.

Q Now, how many elections are there that you had an opportunity to study that was set forth in the reports or—by the consultants in—for the State of Florida?

A Well, in particular, for the racial or ethnically polarized voting studies, there are ecological regressional analyses and extreme case analyses of some 13 state legislative contests, or state House or state Senate in Dade County that involved Hispanic candidates from 1986 to 1990 in either general elections or Republican primary contests. This is quite a considerable data base actually, 13 recent [17] elections in the state legislative area. It is, for example, a much more extensive data base for the particular elections being considered than we had as experts in the Los Angeles County redistricting case, *Garza*

versus Los Angeles County. It's certainly enough to draw conclusions about political cohesion and bloc voting.

In addition, there were ecological regression analyses and extreme case analyses of local elections held within Dade County, elections for positions such as the county commission. And for completeness sake, I also compiled the ecological regression results of those elections.

Q The term "ecological regression and extreme case analyses," those are statistical techniques used generally experts in the field to exam voting patterns?

A Yes. Those are the two techniques used by Dr. Bernard Grofman, expert for plaintiffs in what became the Supreme Court case, *Thornburg versus Gingles*. And those are the techniques that both Dr. Grofman and I used. We were co-experts in *Garza versus Los Angeles County* case. And they are used on a standard basis by experts in this field and were used by experts and consultants for the various bodies of the State of Florida.

Q And—and for the record, doctor, you testified on behalf of the United States Department of Justice in the *Garza* case and in other cases as well, have you not?

[18] A I testified on behalf of Justce in other cases, in *Garza*, as well as other plaintiffs and defendants.

Q Now, these 13 elections that you analyzed, would you give us some of your conclusions about what—what the study of that information shows, not in terms of your ultimate conclusion about cohesion or bloc voting, but what do these 13 elections tell you and where are they set forth in your affidavit?

A These elections are simply compiled in Table 1 in my affidavit. I did not, as has already been indicated, do any independent ecological regression or homogeneous precinct analyses. I simply took the results compared by experts and consultants for the state and reported them in Table 1. And my conclusions and particular findings are summarized in the affidavit.

Simply put, what I found was that for the 13 state legislative elections examined by experts for the state, they show a clear pattern of racially polarized voting,

marked by Hispanic cohesion, white bloc voting, and black voters that, to the extent they were able to isolate information on black voters, showed that they united with white voters in opposition to Hispanic candidates.

In particular, with respect to the political cohesion of Hispanic voters, I found that in 11 of 13 elections, 11 of the 13, the ecological regression results reported show that [19] by a majority of 75 percent or more, Hispanic voters united behind Hispanic candidates in elections for state Senate and state House in Dade County. The only exceptions were to primary elections; one, a three-way primary, and the other in the uncontested primary.

On average, for all 13 elections, the mean vote by Hispanic voters for the Hispanic candidates was 79 percent compared to a mean Hispanic vote for nonHispanic candidates of 21 percent.

So empirically the data shows a cohesive Hispanic electorate that an overwhelming majority prefers to vote for Hispanic candidates in state legislative contests.

In addition, these same results show a pattern of strong bloc voting by whites. That is, whites consistently preferred different candidates than the Hispanics, in particular the non-Hispanic candidates, likewise, by very large majorities.

The experts for the state were able to isolate white bloc voting in 12 of the 13 elections. In 11 of those 12 elections a majority of the white electorate voted for non-Hispanic candidates. In ten of the 12 elections the white majority vote for nonHispanic candidates was two thirds or greater.

So in ten of the 12 elections which we have data on whites, they voted by two thirds or more on the non-Hispanic [20] candidates.

Overall, the mean white vote for nonHispanic candidates was 76 compared to a mean white crossover vote for Hispanic candidates of 24 percent.

Finally, with respect to these polarized voting findings. In most cases the experts were not able to isolate the

black vote and separate it out from white and Hispanic votes, but in five instances, either through ecological regression or extreme case analysis, results for black voters were reported in all of those five elections, in everyone of them, blacks voted for non-Hispanic candidates by majority of 80 percent or more. That means that the maximum black vote in any of the five elections to which estimates were obtained for the Hispanic candidates was under 20 percent. Never even reached a 20 percent black vote for the Hispanic candidates.

So to sum up, the state legislative data shows a pattern of Hispanic cohesion, strong bloc voting by whites, and to the extent the voting of blacks could be isolated, the black vote likewise was cast in opposition to the candidates of choice of the Hispanic electorate.

Q And the legislative results that you just set forth, those are set out in your affidavit in Paragraphs 5 through 8, is that correct?

A Yes. And in Table 1.

Q And in Table 1?

[21] A Which simply reports the ecological regression results, organized by whites, blacks and Hispanics, and in parentheses where they reported homogeneous precinct results I put them in as well.

Q Now, where there were additional—you described state legislative results. Have you also examined the results of the elections that were analyzed regarding local office in Dade County?

A Yes. For completeness, since there were local elections involving Hispanic candidates that were reported by experts for the state, I did summarize the results of those elections as well. And they show—

Q What do she show?

A —similarly a pattern of Hispanic cohesion and white bloc voting, and likewise blacks uniting with whites in opposition to the Hispanic candidates of choice.

I won't belabor these, but in seven of ten elections for these local offices in Dade County, a majority of the Hispanics voted for the Hispanic candidate. In eight of

ten a majority of whites voted for the non-Hispanic candidates. And in seven of the nine elections which results for blacks are reported, a majority of blacks supported non-Hispanic candidates.

So again, usually Hispanic voters show that they prefer to elect Hispanic candidates in these local elections, [22] and usually white and black voters showed that they didn't.

Q Your affidavit in Paragraph 10 says that there is a high degree of racially polarized voting and it's been documented for the elections. What does that indicate with regard to the ability of Hispanic voters to elect candidate of their choice to office for legislative races?

A Of course, polarization among racial and ethnic groups has a direct bearing upon election outcomes since it influences the extent to which various voters can muster support for candidates of their choice.

What these patterns of polarized voting show is that Hispanic voters would have opportunities to elect candidates of their choice only in districts with substantial Hispanic majorities.

In other districts, the candidate of choice of Hispanic voters would usually be defeated by the bloc voting of whites joined in by blacks. So these polarized voting plans indicate that the racial composition and ethnic composition of districts has a significant and direct impact upon the ability of the Hispanic minority in Dade County to elect candidates of their choice.

* * * *

[24] Q How do the results that you have reported, how does that compare to results of past elections in Dade County for Hispanic voters?

A Well, these findings of racial and ethnic polarization are consistent with the actual results of elections. We kind of find here what we also found in Los Angeles, kind of a threshold effect with respect to Hispanics. Once the Hispanic concentration reaches a certain point, then all those districts seem to elect Hispanics, but below that

given point, none of the districts seem to elect Hispanics. And the ethnic and racially polarized voting is reflected in the actual results of Dade County elections in which no Hispanic candidate—excuse me, no candidate of choice of the Hispanics, no Hispanic candidates has been elected in districts below a 59 percent Hispanic level, and in districts at 59 percent and above, those districts have in every instance elected Hispanic candidates. You kind of have very uniform patterns which are extremely consistent with the [25] statistical results.

This is a case where we have a method of what's actually happening on the ground in elections and what the statistics seem to be telling you.

Q Are these results that you have reported today and set forth in your tables, are they consistent with the reports done by experts and consultants for the State of Florida?

A Yes. In reviewing those reports, it seems to me, sometimes quite explicitly, and certainly of quite tacitly, the experts and consultants for the state recognize that there is strongly polarized voting in Dade County and that such polarization has a significant impact upon the ability of Hispanics to elect candidates of their choice. In particular, consultants did not find any of the plans that they analyzed, they analyzed a lot of them, that any district in Dade County was, in their terms, an effective Hispanic district in less and included and Hispanic voting age majority and indeed a substantial Hispanic voting age majority. Voting wasn't polarized along racial lines and ethnic lines. Voting was random with respect to the racial and ethnic composition of districts. You would not find such a clear cut pattern that the consultants found. No districts were affected for candidates of choice for Hispanics unless they had a substantial Hispanic majority.

So their findings about polarized voting and it's [26] political impact mesh with the findings I have been reporting to this court this morning.

And indeed in the—one of the submission letters by—I believe it was the state Senate. If I can find the reference here. They explicitly talk about a cohesive Hispanic electorate within Dade County and indicate that their Senate districts support that consistent Hispanic cohesive electorate. I'm sorry. Let me find the exact reference.

(Pause)

(Discussion off the record)

JUDGE STAFFORD: (Indicating)

BY MR. HEBERT:

Q Well, while you are looking for that—

MR. HEBERT: Judge Stafford?

A Here it is. These supermajority districts—

BY MR. HEBERT:

Q Where are we?

A I'm on the very end of Paragraph 13. This was a transmittal letter from the Florida Senate. And these conclusions are consistent with mine where I am just reading from the end of their short quote, the very top of the page. The supermajority districts respect the cohesive Hispanic communities within Dade County. And likewise my analyses of Hispanic voting shows with respect to voting, you do indeed have cohesive Hispanic entities in Dade County. So I don't [27] see a dissidence here between my findings and theirs.

MR. HEBERT: Judge Stafford?

JUDGE STAFFORD: Dr. Lichtman, I don't want to interrupt your presentation, but I want to satisfy myself that in—in all of this, whether it's your work or your extrapolation from somebody else's, that purely local issues have been ferreted out of these—of these figures. In other words, some of the volatile local—I think it's Tip O'Neal that says all politics is essentially local. And—could it be that in some of these areas even in Dade County, within the county itself, that there are local

issues that just the people living in that particular geographic locale would have some interest in and would not necessarily reflect anything other than a—a focus for that finite period of time on a purely local issue, be it a bond issue or something else?

THE WITNESS: Certainly would not dare to disagree with Tip O'Neal.

(Laughter)

Indeed there are always local issues, of course, that affect elections typically, locally based elections like state legislative ones. What I think is particularly revealing in this data was regardless of what the particular local issue is, might have been in a given election, regardless who the candidates might have been, regardless of what they spent or how they campaigned or how they presented themselves, nearly [28] uniformly, not quite, but nearly uniformly you find Hispanic voters uniting behind Hispanic candidates in overwhelming numbers, and you find white voters and black voters likewise in overwhelming numbers in almost every instance uniting for nonHispanic candidates.

So how those local issues might filter through, you still find this very strong pattern of racially polarized voting which is why we try to look at a pattern. You don't just look at a single election which could be influenced by local factors or having an unusual situation like a black Republican running in a general election. And we certainly have a sufficient number of state legislative elections here and a clear enough pattern to see the racial and ethnic polarization even coming through all the various local factors that might have impinged on every one of those elections.

JUDGE STAFFORD: (Nodded affirmatively)

BY MR. HEBERT:

Q You mentioned before that there was a reference to Florida Senate's submission in terms of districts, supermajority districts. And they indicated and you quoted

that they respect the cohesive Hispanic communities in Dade County. What I want to ask you is not so much to focus on the state's plan, now, with regard to the Senate, and we will talk about the Senate here, can you tell me whether there are any additional plans, alternative plans that provide additional [29] opportunities for Hispanic voters in the state Senate in Dade County than the state's plan?

A Yes, there are. And in light of the polarized voting findings, in particular, I examined a plan which I believe it's called Reaves, Brown, Hargrett for the Senate which creates within Dade County an additional, quote unquote, supermajority district, District No. 40, with a substantial Hispanic voting age minority of 62.1.

MR. WAAS: Your Honor, I would object. We are getting into information now that is appropriate for any remedy stage of the proceedings, as opposed to liability.

JUDGE VINSON: Overruled. He doesn't have to repeat what we have already heard about the Reaves, Brown plan. Let's just go on.

MR. HEBERT: I think, Your Honor, my only point, we won't belabor this, is to show that if you actually take the results of the elections that the state has analyzed and look at those conclusions that are—everyone I think agrees to, and then look at the plans in light of those, he is simply characterizing what those plans provide. But I won't belabor it.

BY MR. HEBERT:

Q Did you finish up, doctor?

A Not quite. Just briefly summarized, I looked at these recompiled election returns, as we call them, the ones that [30] the state specifically chose as their so-called base line data base, that if you wanted to pick a representative election to see how a candidate of choice of Hispanics might fair, they chose the 1986 and 1990 Martinez gubernatorial elections. When I recompiled—I didn't recompile it, but when I looked at how the state had recompiled it for District 40 in the Brown, Reaves,

Hargrett plan, what I found was for the two elections, on average, the vote for Martinez was 55 percent. This result for the Reaves plan is not substantially different than the result for one of the three districts that the state has certified as providing Hispanic opportunities, that is District 37 in the state's plan, where the mean for Martinez was 56.3 percent, just a 1.3 percent difference between this district in the Reaves, Brown, Hargrett plan and one of the state certified districts in their own plan.

Q And—

A This data, as well as the racially polarized voting data, indicates that while one certainly would not say that district 40 provides a lock for the candidate of choice of Hispanic voters, it certainly does provide at 62.1 percent a realistic opportunity for Hispanic voters to elect candidates of choice in this district.

And I may add, by the way, in my view, the choice of Martinez elections for looking at opportunities for Hispanics is a very conservative one because in 1990, for example, [31] according the states data, the support by Hispanics for Martinez was only 59 pursuant, whereas as you remember in the state legislative elections the average support by Hispanics for Hispanic candidates was much, much higher, up in the range of about 79 percent. And although it's also true that white crossover voting is greater for Martinez than it typically is for these legislative candidates, that would not compensate for the much higher cohesion in the state legislative elections.

So I think even to the extent the Martinez elections show opportunity, if you had looked at state legislative elections, you would have found even greater Hispanic opportunity in District 40.

Q And to finish up with the Reaves, Brown plan, does the Reaves, Brown plan for the Senate in Dade County sacrifice any opportunities for black voters?

A No, it doesn't. And again, I looked at the two black districts in the Reaves, Brown, Hargrett plan and used the four base line elections also chosen by consul-

tants of the state. They were the Jackson primary, two Alcee Hastings primaries, and a yes vote for Mr. Shaw.

For both of those districts and for all of the elections, when you recompile the results in the two black districts in Brown, Reaves, Hargrett, the black candidate received in those districts at least 70 percent of the vote. [32] So in those districts, the black candidate was overwhelmingly winning.

* * * *

[35] A My opinion with that caveat, is that blacks are politically cohesive, that they do unite in large numbers behind candidates of their choice and do prefer to elect black candidates when there are elections with black candidates competing against candidates of other races.

Q Do you have an opinion about the extent of the political cohesiveness, if there is any, between blacks and Hispanics in Dade County?

A In my experience, blacks and Hispanics in Dade County are [36] not jointly cohesive.

* * * *

[49] Q. In the work that you did, in your, I guess, analysis of the other experts' analyses, did you make any attempt to determine how the various campaigns were put on, what kind of strategies the candidates used, how much money the candidates spends, what kind of targeting the candidates used? Did you do any of that?

A. No.

Q. And, of course, as an expert in this area, you are well aware that these types of aspects of political campaigns are important, wouldn't you agree? It's important to know how candidates campaign, how they spend money, how they do all these things—target media, direct their campaigns, channel their energies?

A. It is important for some purposes. As I've explained to the Court, though, for this analysis what we find is irrespective of all of those factors. Whatever the campaign level of funding may have been, whatever the

personalities, whatever the issues, overwhelming majorities in a vast majority of the elections, Hispanic voters united behind Hispanic candidates, and white and black voters united behind non-Hispanic candidates.

* * * *

[50] Q. What studies have you done, what analyses have you performed with respect ot the dynamics of Dade County voting that would support the answer to the question I just asked you?

A. Precisely the study I reported here, showing that on average fo rail the state legislative elections, you had nearly an 80 percent Hispanic vote for an Hispanic candidate. To put that in some perspective, in America political history, a land slide election is regarded at the 60 percent level. So we are substantially above land slide Hispanic support for a Hispanic candidate. That is just the empirical results.

Q. Let's put these into numbers. If you have a 55 percent district, and you get 75 or 80 percent of the Hispanic vote, of that 55 percent, you are going to have a problem, aren't [51] you, as far as being able to elect a candidate of choice? Isn't that true?

A. No, not necessarily.

Q. What analysis have you done that supports your answer that that's not true? What independent examination have you performed in Dade County?

A. Precisely the analysis presented here. You only gave me half of the equation—that is, the Hispanic vote for the Hispanic candidate. There is another half of the equation, and I talk about this in my articles that I referred to about how you assess realistic opportunities, and that is the crossover vote on the part of non-Hispanics. Your question presumed a zero crossover. That is very unusual. And, in fact, we find on average about a 25 percent crossover.

So, to take your hypothetical of a 55 percent district with 80 percent Hispanics, if you multiply 55 times .8, that comes out to about 44 percent of the Hispanic voters

alone. If you multiply the other 45 percent times 25 percent, you get 11 percent, and that comes out to a 55 percent vote.

Q. Are you talking about total number of citizens, or are you talking about voting age population?

A. I'm opearting solely within the context of your hypothetical, which had to mean voters.

* * * *

[68] Q. Now, Dr. Lichtman, I have had occasion to examine your work in lots of cases, and is it not your typical pattern to calculate the likely Hispanic or black candidate success by coming up with a combination of Hispanic cohesiveness plus [69] non-Hispanic crossovers to determine whether that figure indeed exceeds the votes for the opponent?

A. Run that by me again.

Q. All right. Has it not been your practice in many cases, in Lyco County, for example, comes to mind—in fact, I think you did this in Hardee County as well, and there are probably other examples—where you have taken the Hispanic support for the Hispanic candidate—

A. Yes.

Q. —added to that the white crossover anticipated—

A. Yes.

Q. —and in this case, the black crossover—

A. Yes.

Q. —and then compared that with the anticipated white vote for the white candidate, black vote for the opponents, and so forth. Is that not your standard practice?

A. I have done both recompiled election results and this technique that you've pointed out, yes.

Q. And did you use that technique in this case?

A. No.

Q. You did not?

A. No.

Q. So, you don't know—you have done no projections of how your typical procedure would result—would sug-

gest what the outcome would be in these particular districts?

[70] MR. HEBERT: Object to the form of the question, the word "typical." He has indicated that he's used both techniques, and he's used one here. He said he didn't do any independent analysis four times on cross-examination with the first counsel, and he's already said it again here, Your Honor.

JUDGE VINSON: Overruled. Dr. Lichtman can answer the question, and he can explain that. Go ahead.

BY MS. BUTLER:

Q. Dr. Lichtman, why did you not do that particular analysis in this case?

A. As I said, I did not do any independent analyses in this case. I simply relied upon the data that was in the record and available to me.

Q. Doctor, isn't that information in the record and indeed in your report? Could you not have done that analysis based on the information you've got? You've got Hispanic cohesiveness: you told us about that.

A. Pardon me?

Q. You've got Hispanic cohesiveness; you told us about that.

A. Yes.

Q. You've got white crossover; you told us about that.

A. Yes.

Q. Black crossover; you've told us about that.

[71] A. Yes.

* * * *

Q. So, basically, we are left with the only amount that you have for District 40 is based on the Governor's race?

A. And the comparison of the results of the Governor's race to the results in districts certified by the state as providing Hispanic opportunities, and the fact that this [72] district is above the threshold level of districts which

in Dade County have elected Hispanic candidates of choice.

Q. Dr. Lichtman, isn't it the case in the Governor's race, the white crossover vote for Matrinez was 47 percent?

A. I don't recall it being 47. I recall 41. And I talk about that in my affidavit, where I explain, although the white crossover vote is greater in the Martinez race than it is typically in the state legislative races, that would not compensate for the much lower levels of Hispanic cohesion in the Martinez race as opposed to the state legislative races. And that is a ground for my opinion that, in fact, if you would use state legislative races or other races with more typical levels of Hispanic cohesion, you would have found greater levels of support for Hispanic candidates of choice in District 40 in the Brown, Reaves and Hargrett, and, for that matter, in the state districts as well.

* * * *

[73] Q. And what do you know about the citizenship levels for the Hispanic voters in the Hargrett, Browns District 35 and District 40?

A. I haven't studied citizenship levels at all in Dade County. But all of those factors that you talk about would be filtered through the recompiled election results. In other words, to the extent that Hispanics are not citizens and don't vote, they wouldn't be counted in any of the recompiled elections results. So those factors are taken into account.

* * * *

[74] Q. I think it's an important point.

Okay. I assume your bottom line conclusion, if you had reached one, about white turnout, white crossovers, Hispanic cohesiveness, would depend in part on white crossover?

A. Yes, which is likewise, again, since the vote is a function of the black—excuse me—the Hispanic vote and the non-Hispanic vote, filtered through the recompiled

election results, and I think I already testified, in a very [75] conservative way, I think understates the ability of the Hispanic to elect in all of these districts.

* * * *

[80] Q. I understand, Doctor, that your position is that the opportunity is there, if the Hispanic cohesion, plus the white crossover, equals majority. Is that a fair characterization of your—

A. Under those circumstances, the opportunity would certainly be there, which would be reflected in actual election results.

* * * *

[87] MR HEBERT: Your Honor, if I may, I'm going to move to strike all of the questions and answers relating to Republicans on the school board in Dade County and whether they have been successful in elections. I would ask the Court to defer a ruling on my motion, which I'm willing to withdraw, if the state fails to prove it in this case. We are asking this witness to assume facts that, in my judgment, are beyond the scope of what was presented in the congressional case, and if the state goes ahead and proves that, I withdraw my motion. But I do move to strike if they are asking to assume facts that are either inaccurate or they're not willing to prove.

MS. BUTLER: Your Honor, I'm perfectly prepared to [88] have the questions stricken, if it is turns out not to be true.

MR. ZACK: I want to point out to the Court, it is specifically contained in Table 2 of his report. He refers to black Republican opponents, and goes to the very core of this case. If, in fact, the reason people are elected is because they are Democrats or Republicans, it has nothing to do with—

JUDGE VINSON: It is clearly relevant. The only issue is whether it's accurate factually, and the witness said he didn't know. So it's based on an assumption. I'm not sure that we need to go further than that. The motion to strike is denied.

* * * *

[94] Q. Do I take that to mean, Doctor, that these were very substantial majority Hispanic districts?

A. I believe I recommended to the county commission that they target around 65 percent for Hispanics and around 55 for blacks.

Q. So, would you not have included District 40 in the Hargrett, Reaves, Brown plan at 62 percent?

A. No, but that was for an entirely different purpose. As I've explained, we wanted to make sure we had districts that were virtually safe seats; that were safe seats for candidates of choice for Hispanics and blacks, and we erred on the side of making sure that those seats would be safe so there would be no controversy about whether these were absolute rock solid Hispanic and absolute rock solid black seats. When we did the recompiled election returns for Hispanic local candidates in those races, we found in 65 percent districts the Hispanic candidates were overwhelmingly winning, which supports my conclusion that a 62 percent district, while not an absolute lock, not an absolute assured seat, certainly comes well within the range to provide Hispanic voters a realistic potential to elect candidates of their choice.

* * * *

[217] Q Did you examine any alternate plans that have been filed in this case with regard to the House plan?

A Yes, I examined the De Grandy plan with respect to Hispanic House districts.

Q And what did your analysis show with regard to the De Grandy plan insofar as the House is concerned?

A That analysis is laid out in table four of my affidavit, the very last table just before the attachments at the end, and table four shows that the State plan creates nine majority Hispanic House districts within Dade County.

The De Grandy plan creates an additional two House districts within Dade County for a total of 11.

The House districts within the De Grandy plan in terms of Hispanic voting age population range from a

minimum of 64.6 percent, 64.5 percent, that is Districts 109 and 112.

[218] That compares to the State plan where their lowest district in terms of Hispanic voting age population is 63.8, so in terms of voting age population there is at least roughly a 65 percent Hispanic voting age population created for every one of the De Grandy plan districts and the State plan actually dips down ever so slightly lower than that for its minimum districts.

Both the State districts and the De Grandy districts indicate a mean vote for the two base lines of over a 50 percent level, and as I testified to this morning in my view these base line measures are an underestimation of Hispanic voting strengths in districts, and when I looked at local elections, when I was working with Dade County, I found that the 65 percent level a much more substantial majority for candidates of choice of the Hispanic community.

Based on this analysis it is my view that the 11 districts within the De Grandy plan, and likewise the nine districts within State plan, are districts that do provide Hispanics a realistic opportunity to a elect candidates of their choice.

Even the State's own analysis, they actually did a district-by-district analysis of the De Grandy plan districts, which is attachment one, the very next item in my affidavit, they did a district-by-district analysis, and they divided districts into two kinds; one that was called [219] effective minority districts; and the other that was called not effective minorities districts.

And as you can see, none of the 11 districts within the De Grandy plan were rated not effective. All 11 of those districts fell into the effective category by the State's own analysis.

They in turn, however, divided effective minority districts into two separate categories, those they regarded as completely safe for minorities, which they called safe seats, and those which give minorities an equal opportu-

nity to elect candidates of their choice that they call competitive seats.

Both of them, mind you, are effective Hispanic districts, it's just that they further subdivide into safe and competitive, and they do rank most of the De Grandy districts as competitive although effective Hispanic majority districts.

As one final comment though on that ranking, I think there were some real problems with the way the State chose to subdivide effective Hispanic districts into what they call safe districts and competitive districts, and I am quoting here from Florida House of Representatives June 4, 1992, letter to John Dunn, attached report of election data services by Dr. Lisa Handley, June 2, 1992, page four, that report says quote, "A Hispanic House district was considered [220] safe if it was at least 67 percent Hispanic in total population, and if the Hispanic preferred candidate won both of the elections examined." That's the 1986 and the 1990 base line Martinez elections.

First I think the categorization has some conceptual problems. I don't find any foundation for the arbitrary cutoff of 67 percent. Why do you decide if a district falls below 67 percent in total population, it must be rated at minimally a competitive district, and why the Hispanic preferred candidate has to win both of the elections examined?

I know of no foundation for doing that in the literature and I see no foundation for picking out numbers like that here.

In addition, I find that the standards are not consistently applied, and therefore aside from the conceptual problems there is a reliability problem.

We are now at the end of the affidavit. The very last page is the State's analysis of the nine State districts in the State adopted plan, the very last page attachment number two, and you can see on that table that eight of nine of the State plan districts are rated safe rather than competitive.

But if you will look at District 102, the very first district, and you look down the Hispanic population, [221] you see it's 65.6, below the threshold of 67, and yet that district is rated safe.

If you run down the page a little bit farther to District 115, you see that district is 65.3, also below the 67 percent threshold and that district is rated safe.

In addition, if you looked at the Martinez projections, you would see the number of cases the distinction between safe and competitive rests on some paper thin differences, 51 percent, 52 perceat is regarded as safe, 48 percent, 49 percent is regarded as competitive.

So while I would agree with your general assessment that both the districts in the State plan and in the De Grandy plan are effective Hispanic majority districts that do give Hispanics realistic potential to elect candidates of choice, I have problems with the further subdivision into safe and competitive.

I don't think that would be a basis for deciding that the De Grandy plan did not give Hispanics increased opportunity to elect candidates of choice. The addition of the two districts all of which are in the 65 percent range or more, does provide such opportunities for Hispanics.

Q Let me ask you this about the De Grandy plan with regard to the creation of Hispanic districts and its relationship to the creation of black districts in the House plan.

[222] Can you tell us what impact, if any, positive or negative that the drawing of the districts in the House plan as set forth in the De Grandy plan impacts on the black districts?

A Again to explain the limits of my testimony with regard to, I compared the De Grandy plan with the State plan. I did not compare it with any other hypothetical alternative simply to determine whether expanding Hispanic opportunities under the De Grandy plan would undermine black opportunities that are provided under the

State passed plan, and I found that the De Grandy plan creates four black House districts in Dade County with non-Hispanic black voting age population of 54.6 percent or more, right around the 55 percent target that I found was, in fact, a safe seat, much less an opportunity seat within Dade County.

Likewise, the State plan creates four black districts in Dade County with non-Hispanic voting age populations of 51 percent or more.

The State's consultants own report regard both the four districts in the De Grandy plan and the four districts in the State plan as safe.

My own analysis in the case the De Grandy districts are certainly provide at least as much opportunity for blacks to elect candidates of their choice as do the districts under the State plan.

[223] Therefore, there does not appear to be any dimunition of black opportunities resulting from the expansion of Hispanic opportunities under the De Grandy plan.

* * * *

[241] Q Okay. My question is again to you, and slow me down if you must, but can you present to this court a legislative election in Dade County in which Hispanic candidates of choice were defeated—I will take out the word usually if it will make it easier—were defeated by the bloc voting of candidates of non-Hispanic voters?

A I will simply repeat my answer. There are one or two examples in non-Hispanic majority districts. There are no examples in the heavily Hispanic majority districts which is the bulk of the elections.

Q My question is, can you present any evidence of any election in a legislative race in Dade County which meets that standard to this court?

A Any election held in a district below 59 percent?

Q Any legislative election, yes.

A I just answered it.

* * * *

[252] BY MR. HEBERT:

Q The census data, Your Honor, shows that the number of Hispanics in 1980 in Dade County was five hundred and eighty thousand nine hundred and ninety-four. That was in 1980.

The total population for the Hispanics in 1990 was nine hundred and fifty-three thousand four hundred seven, an increase from 1980 of 64.1 percent.

Now, Dr. Lichtman, having said that does that kind of growth in the Hispanic population, do you have any reason to believe that there has been no further growth in the Hispanic population in Dade County since the census was drawn?

A I have two comments on the census data. One, there certainly has been further growth; and, secondly, there is certainly an undercount of Hispanics relative to whites, and that has been established generally at about five percent, and so both because of the growth and because of the undercount there is no doubt in my mind the Hispanic population by now is well above 51 percent.

* * * *

[292] Q How many Hispanic representatives, State Representatives are there in Tallahassee? How many did you say?

A I said there are seven from Dade and I think there is one from Hillsborough.

Q And what is his, the one from Hillsborough's party afiiliation?

A He is a Democrart.

Q And what are the party affiliations of the State Representatives from Dade County?

A They are all members of the G.O.P.

Q Have you looked or do you know whether the Hispanics outside of Dade County are politically cohesive with the Hispanics inside Dade County?

A No, I did not.

* * * *

TESTIMONY OF WILLIE FRANK LOGAN

TR VOL. III

* * * *

[88] Q There are only two black senators, Senator Meek and Senator Girardeau, is that correct?

A Yes.

Q And both of them supported what is now the Florida plan?

A Yes.

MR. HEBERT: Excuse me, if I could just clarify the form of the question. Supported in what sense?

* * * *

[125] BY MR. POWELL:

Q Representative Burke, how long have you lived in Dade County?

A 22 years.

Q And in your experience in Dade County what group would you say has suffered the greatest from racial discrimination? Would that be Hispanics or blacks?

A I think it's clearly—

MR. HEBERT: That goes beyond the scope of direct.

[126] JUDGE HATCHETT: Objection overruled.

THE WITNESS: I think it clearly has been the African-American community both from this development in terms of social matters, primary to business development, I guess maybe health care, but it's just been clear, and politics, because just during the time since the '58 to '60 when many of the, you know, Cuban brothers came over, what happens is that the largest two cities in Dade County have now, are in effect in control I think of the Cuban community.

The black community I think perhaps has two cities, maybe Florida City and Opa-Locka are two of the smaller cities in which one might call control, but two larger cities are in control politically.

From as far as business development there is actually no, no comparison, and part of it has been because of a discrimination. Bank loans, it has been documented that somehow in the black community you don't get commercial loans, you don't get residential loans.

That is not the case in the Cuban community which even has its, you know, own banks. And part of it again has been part because of discrimination has happened just even, just we are talking about the last 30 years, but—

[127] JUDGE HATCHETT: Thank you, Mr. Burke. You have answered that question.

BY MR. POWELL:

Q Just one moment, Your Honor. Well, actually two more.

You have said you worked with the Cuban-American caucus. Do you know what the political makeup of the Cuban-American caucus is, the membership?

A Yes, there are seven members who are Cuban-Americans from Miami, and Mr. Martinez I think is a member who is I think a Cuban from Tampa.

Q Okay. Are there any Democratic members that are part of the Cuban caucus?

A I believe Mr. Elvin Martinez, he has great participation, he is in the suite but, but I seem to have a friendly relationship.

* * * *

[142] Q Representative Logan, do you have an opinion about whether or not the creation of a fourth Hispanic district in Dade County would have a retrogressive effect on the interest of black voters?

A Yes, I do.

Q What is that opinion?

[143] A Well, the fact of the matter is that if you do a fourth Hispanic district in Dade County due to the fact that you need non-Hispanic people to make up the numbers to include the district, you would deny the opportunity for two black districts wholly within Dade County.

* * * *

[147] and a moment to explain. I believe that the Joint Resolution as adopted by the Supreme Court better represents the black community not only in Dade County but in South Florida. And the reasons for that are very simple: First of all, the seat that's in South Dade, which is only a 30-some odd percent voting age population seat also includes non-Cuban Republican Hispanics, that which are the Mexican community, which have proven over a period of time that they support not only Democratic candidates but they're willing to support black candidates. And that was an example in the Daryl Jones' House seat that also was testified at the South Dade hearing by the American-Mexican community, that they prefer to be in the district that would be represented by a black versus being in a district that was being Republican.

* * * *

THE WITNESS: I suggest to you if you look at the Alcee Hastings race, how he would have done in that particular district; if you looked at the Jesse Jackson race, how he would have done in that particular district; if you look at any Democratic candidate including Pajcic, Chiles, McKay, they all would have won that district Senate 40. So, I suggest to you [148] that it is a seat that effectively would elect a black.

Now, if you don't do a South Dade seat and keep it mostly in South Dade and include the second black seat to be in North Dade, then what you do is instead of having three black seats in South Florida, you only could have two because you must disenfranchise the Fort Lauderdale community from north Broward and south Palm Beach in order to create a second black seat that would include both Dade and Broward.

So, therefore, overall I feel that the Joint Resolution gives the best perspective in South Florida to elect as

many African-American candidates of the choice of the community.

* * * *

[152] A Both of those districts would allow that, I believe. I would say, though, that I think it's a little bit more difficult when you have districts that take in two large urban areas that are separated by about fifteen miles in terms of the cost of campaigning, in terms of the fact that there is little name recognition of legislative or people from Fort Lauderdale versus people from Opalocka. And, therefore, those districts not being as compact are a lot more difficult than those districts that are compact as being proposed by the NAACP.

I also would say to you as relates to the effectiveness of those districts, the caucus including Reaves/Brown suggested that we should try to keep districts within the communities of Dade County, Broward County and other areas, which is what was advocated in the Congressional plans, which is why we've tried to stay away from combining two urban areas when it was unnecessary to create a 50 percent district.

And, therefore, I would say that the two districts in the Reaves/Brown plan are not as safe as districts that would be kept wholly within Dade County.

* * * *

[155] Q Is the district under 40 percent black in voting age population?

A Yes, it is.

Q And isn't it correct that in the Reaves/Brown plan there is an additional district in southern Florida which has I believe a 47 percent black voting age population?

A Yes.

Q All right. So, there is that additional—what we would call an influence district there—isn't that correct? Just

* * * *

[156] A Yes, I can. And, I mean, I can give you valid reasons why, first of all, there was testimony by the Joint

or Reapportionment Task Force which represented the black community in Dade County, that they would prefer to have two black districts within Dade County. There was also testimony in Fort Lauderdale by the black task force, the NAACP, that they would prefer to have a black district based in Fort Lauderdale.

* * * *

[157] Q It's a district that you're not familiar with?

A Yes.

Q You haven't examined it?

A No, I haven't.

MS. WRIGHT: All right. Then I have no further questions.

MR. HEBERT: I'll be very brief.

CROSS EXAMINATION

BY MR. HEBERT:

Q I just really want to clarify one thing, Representative Logan. I believe you testified in your direct testimony that there were two majority black VAP districts in the Dade area under the State's proposed plan?

A No, I did not.

Q Okay. I wanted to make sure that that was not your testimony. In fact, there is only one majority black VAP districts within Dade County under the State's proposed plan as modified by the Supreme Court and ordered by this Court?

A You're correct.

[158] A The black community requested to have two black districts within Dade County 50 percent VAP. We were not able through the legislative process to accomplish that. But the respect and the request of the black community to have two black Senators from Dade County was honored in that the Senate believed and I agreed that there was a second seat created in South Dade that

would effectively elect a black candidate even though it was not 50 percent VAP.

Q And the district that was just identified by Ms. Wright, the Reaves/Brown Senate district that she said was 47.1 percent black, that's a Palm Beach and Hendry district; is that what your understanding is?

A Yes, that's my understanding.

* * * *

[163] Q Now, in your travels through Dade County, have you determined whether Puerto Ricans wish to be considered as part of the Cuban community or the black community?

A Well, and his name was mentioned yesterday, Luis Rojas, who is a Puerto Rican in the Windward area, who is head of the Puerto Rican Democratic Association, testified at the Opa-locka public hearings that the Puerto Ricans in Windward were more politically affiliated with the Democratic party and would prefer to be in the district that would include the black community. We also had similar testimony in South Dade at the public hearing.

Q What about Hispanics, sir?

A The Mexican-American community was represented at South [164] Dade public hearing and they also testified in that particular area in South Dade that they were more politically aligned with the Democratic party and would prefer to be put in a district where they would have a Democratic makeup.

* * * *

[165] A No, sir; it wasn't. The caucus adopted the plan as it was passed by the Florida House of Representatives, which included two black districts within Dade County with a VAP above 50 percent.

Q That's what I wanted to clarify.

A That's the official caucus position.

Q And then what happened after that is the SJR-2 came back to you all?

A Right. And the caucus did not take a position on that particular plan but eleven I believe of the fourteen members of the caucus, including the two Senators and the black member from Souht Dade, agreed that the compromise that was worked out between the House and Senate would effectively still allow blacks to be—a second black to be elected in the Senate seat within Dade County. And, therefore, eleven of the fourteen members supported that Joint Resolution. It was not official caucus position.

Q That is, eleven/fourteen you just cited. And that was the Senate—what we now call the State/Supreme Court plan as modified and approved by this Court; is that correct?

A Yes, sir.

Q Not the HR&B plan?

A Right.

* * * *

[167] Q Representative Logan, what is your position at the present time on the Black Legislative Caucus?

A I'm the Chairman.

Q Does the caucus have an official position with respect to the Reaves/Brown/Hargrett plan?

A They're opposed to it.

* * * *

[170] JUDGE VINSON: The objection is overruled. Go ahead and ask the question.

BY MR. BURR:

Q Just identify the counties that district 28 crosses, please.

A Well, there are nine and there are initials here, some of which I don't recognize. But there is Broward, Glades, Hendry, Indian River, I guess this is Manatee, Okeechobee, Palm Beach. And I don't know what STL is and I'm not sure—

MR. RUSSELL: St. Lucie.

BY MR. BURR:

Q St. Lucie?

A St. Lucie. But there are nine of them and they're all through Central Florida.

MR. ZACK: Excuse me. To clarify, that's Hargrett/Reaves you're referring to?

THE WITNESS: Yes.

MR. BURR: Hargrett/Brown/Reaves.

MR. ZACK: Thank you.

MR. BURR: District 28.

THE WITNESS: Yes.

MR. BURR: Okay.

* * * *

[189] We are not talking about who has the best plan, whether a better plan could have been devised by the minds of men and women. We are talking about whether this plan, the Supreme Court plan as approved by this Court, fails the Gingles test. And it does not. It is almost a litmus test from which we don't need to proceed any further by showing that under the Senate plan you have proportional representation. It is the district 23 argument that is made in Gingles, that you cannot show discriminatory effect when all the evidence shows that you have at least a portion and probably a much greater representation: Half of the Hispanics have half of the seats. In all probability, 20 percent of the blacks will end up with [190] 33 percent of the Senate seats in Dade County, but most certainly statewide it is proportional under any circumstances.

No single plan, not a single one, has demonstrated the ability to create more than two black 51 percent VAP's.

* * * *

TESTIMONY OF DARIO MORENO

TR VOL. II

* * * *

[5] JUDGE STAFFORD: All right. Mr. Hebert, now let me find out from you before we begin: You're not expanding your case?

MR. HEBERT: No, sir.

JUDGE STAFFORD: Because we asked, put counsel on the record this morning to ask it. The very reason we asked it was to narrow down the focus of this case. And we went to lunch with the idea we were talking about three geographic areas.

Mr. Meros, this is for you.

MR. MEROS: Yes, sir; I understand.

JUDGE STAFFORD: And we heard about Dade, Escambia and something surrounding Alachua. Something happened over lunch. All of a sudden this case just expanded. And I dread to see you walk out of that courtroom because I don't know what you're going to say when you come back.

* * * *

[8] MR. HEBERT: I want to have marked as United States Exhibit 37, a document—and I only have three with me at the time, but they are—if I may represent what they are to the Court: This is the affidavit of Dario Moreno.

* * * *

[13] In this area a colleague of mine, a sociologist, Lisadro Perez, argues you can work, live, do all your daily business, banking, Medicare, groceries, health care, legal aid, everything you want to do in life you can do in Spanish, without speaking a word of English. In fact, in the 1990 census, we found out that Dade County—a majority of Dade [14] County households—the language of choice at home is Spanish, not English.

So, this reflects what has been a dramatic transformation of Dade County's demographics. During the 1980's

over four hundred thousand Latin Americans came into these neighborhoods.

* * * *

A Well, the two most dramatic areas of growth in Dade County for Hispanics are along the beach, Miami Beach. Miami Beach in 1980 census was only 30 percent Hispanic. Now it's 49 percent Hispanic. And the most dramatic growth though has been in this area, this Kendall Lakes, West Kendall area.

* * * *

[16] A Okay. The Hispanics in Dade County are distinguished from Hispanics in the other part of the country by being more conservative and much more Republican than other Hispanic groups, in comparison to Hispanics in California or New York or Texas.

* * * *

[22] Q Describe not only the demographics of the population in each of these districts—and these are senatorial districts we're talking about now—and show us with specificity the identifiable Hispanic populations as they are treated in these senatorial districts.

[23] A Okay. The plan—let me begin on the Beach. That's where I live, the eastern most section of the County. Beginning at the Beach, what the plan does, it creates the 38th district. This used to be—at least most of it, most of Miami—all of Miami Beach and part of the inland—used to be part of the 35th district, which used to be a 55 percent Hispanic district, although it was represented by a non-Hispanic white, Jack Gordon.

What this plan does, it basically expands the district northward all the way to the Dade County line here at Golden Beach and includes the Adventura area, which is a highly non-Hispanic white area of Dade County to the district and removes the Roads section of Little Havana, the south Little Havana area, and parts of Coral

Gables, north Coral Gables, which is also heavily Hispanic. So, the district basically loses thirty-five thousand Hispanics and goes from being 55 percent Hispanic to being 29.9 or about 30 percent Hispanic.

The racial composition of this district is about 30 percent Hispanic, 67 percent black—doesn't even get into double figures—and the rest non-Hispanic whites.

Jack Gordon, who was President of the—who was Chairman of the Senate Reapportionment Committee—lives in that district.

JUDGE VINSON: Before you leave that now, you said it's 55 percent but then it goes down to 30 percent but I'm not [24] sure why it goes down to 30 percent. Does it pick up—

THE WITNESS: Because what it does, it gets rid of thirty-five thousand Hispanics. It gets rid of the thirty-five thousand Hispanics. The district used to include the north Coral Gable area here and the Roads area of Little Havana.

JUDGE VINSON: Chopped off?

THE WITNESS: Chopped off.

Now, moving into the district—the next district is their district 40, which goes from Monroe, includes all of Monroe County, and goes all the way up to a portion of Liberty City, taking US1 to go through this part. It includes Florida City, Homestead, Leisure City, Goulds, most of the pockets of Afro-Americans living in South Dade.

JUDGE STAFFORD: That's now called district 40?

THE WITNESS: Yeah; it used to be 39.

But it also includes the heavily non-Hispanic white area of East Kendall, basically that part of US1, from US1 to the ocean or the bay. And it also cuts through portions of Hispanic neighborhoods. And if you notice on this map, it includes sections of Windward, which is the Puerto Rican neighborhood here, and it—but it also includes this section of basically Cuban American neighborhood, which is part of—which is adjacent to Little Havana.

The racial composition of that district is, I believe, about 33 percent black, 22 percent Hispanic and the rest non- [25] Hispanic whites, over 40 percent. Given racial polarization in which Hispanics would join with non-Hispanic whites to stop an Afro-American candidate and Afro-Americans would join with non-Hispanic whites to stop a Hispanic candidate, which has been the tradition of ethnic polarization, tripartite voter polarization in Dade County, it will be extremely problematic for a minority candidate to pick up this district despite the added—to win in this district—despite the adding of the Liberty City salient here.

Let me—the actual number on the 40th, black is 38 percent black. Excuse me.

JUDGE STAFFORD: And 22 percent Hispanic?

THE WITNESS: And 22 percent Hispanic. But, still, you have about—the largest ethnic group is non-Hispanic whites in that area.

Then let me discuss the 36 senatorial district. The 36 senatorial district currently is represented by Senator Carrie Meek and it is 76 percent black, which raised, of course, the question of packing when reapportionment came up.

What the State plan does, it reduces the number of Afro-Americans because of the Liberty City salient. See, this salient is this area here, because Liberty City, it reduces the percentage of blacks to 49.9 percent of voting age population in the 36 by giving this salient to the 40th congressional district—40th senatorial district.

[26] But what it also does, it adds forty thousand Hispanics to the 36th senatorial district. And it adds this large section of Hispanics going—the Orange Bowl area and east of the airport.

MR. ZACK: Your Honor, I don't know if you want us at this time to correct a matter that is a statistical matter or preserve it for our cross examination, whatever the Court wishes us to do. Either it's a bad mistake or—

JUDGE STAFFORD: Well, what's the problem?

MR. ZACK: There's a—he said in 36 there is 49 percent and 52.5 percent VAP black in 36.

THE WITNESS: 52.5?

MR. ZACK: 52.5. Yes, it is over a majority. Okay. That's the statistics that have been provided.

JUDGE VINSON: It's 52 instead of 49?

MR. ZACK: 52.5.

JUDGE VINSON: Instead of 49.

THE WITNESS: Yeah, it's 52.5.

JUDGE STAFFORD: You stand corrected?

THE WITNESS: Yeah, I stand corrected.

JUDGE STAFFORD: Thank you, Mr. Zack.

THE WITNESS: But the Hispanic population of the district goes from a 26 percent Hispanic VAP to a 33 percent Hispanic VAP in the 36th.

JUDGE STAFFORD: Now, let me regroup on district 36. [27] And any of you—any of you inside the rail here that are actively participating—correct any of these things as they go along, just like Mr. Zack.

All right. Go ahead, Dr. Moreno. Tell me about, again, district 36 again.

THE WITNESS: Okay. Fifty-two percent Afro-American, thirty-three percent Hispanic. It adds basically forty thousand Hispanics from the old 36 district; increases the percentage of Hispanics from 26—

JUDGE STAFFORD: Is this Senator Meek's district then?

THE WITNESS: Yeah, from 26 to 33 Hispanics.

JUDGE STAFFORD: Where did I get the 76 percent black?

THE WITNESS: It used to be 76 percent black. Currently it's 76 percent black.

JUDGE STAFFORD: Is it still called district 36?

THE WITNESS: Yes, it's still 36.

JUDGE STAFFORD: Okay.

JUDGE VINSON: Where are the Hispanics you picked up?

THE WITNESS: The Hispanics are picked up from this area here, east of the airport.

MR. HEBERT: Which, if I may, Your Honor, on the color-filled map, I believe it will be this area I'm pointing to now; would it not?

THE WITNESS: Yes.

JUDGE STAFFORD: The yellow area?

[28] MR. HEBERT: Yes.

THE WITNESS: North Little Havana.

BY MR. HEBERT:

Q Now, while I may, if I could stop you there, since we're on that district, describe for us, if you will, you said this area has a sizable bloc of Hispanic voters?

A Right.

Q Are those voters cohesive voting patterns with the blacks within the district?

A No, they are not.

Q Explain what you mean.

A The Hispanic voters here in precinct analysis I've done with Governor's races and Senate races tend to vote heavily Republican, while the Afro-American voters in these precincts tend to vote Democratic.

The next district is their 39th district, which is a Hialeah district. And this is a super majority Hispanic district. I think it's over 70 percent Hispanic. The 37th is another super majority Hispanic district, over 65 percent Hispanic.

* * * *

[31] JUDGE STAFFORD: It's received.

(Government's Exhibit 7 received into evidence)

* * * *

[33] THE WITNESS: This is 36 district. Okay. You notice there are two figures for blacks, non-Hispanic black VAP and then—which is the one, two, three—fourth column. And that's 49.68, which is my 49 percent, where

I got my 49 percent figure. Mr. Zack's 52 percent figure comes from the sixth column, which is total black.

BY MR. HEBERT:

Q Now, explain why that's important to note the difference between a non-Hispanic black VAP and a total black VAP. Explain why those two numbers are different and what meaning it has.

A My understanding on the literature of black Hispanics is they tend to identify with the language minority stronger than with the racial minority. In fact, the Dominican Republic, which is an almost totally black Hispanic country, there is no one that does black studies. They don't view themselves as black, black Dominicans. That's an example.

* * * *

[34] THE WITNESS: And Hispanic is not a racial category. So, they ask two questions: Your race and they list like seven. And then they ask you are you Hispanic, because you can be a black Hispanic, you can be a white Hispanic and you can be an Indian or a native Hispanic.

BY MR. HEBERT:

Q So, these numbers are from the census itself, which is derived from the individuals who actually fill out their census forms; is that right?

A Right.

Q If you would continue with—

A I finished with the last super majority Hispanic district.

MR. HEBERT: Now, if we could, there is a district—and I need to get one more map, which is the actual Senate plan statewide, so that we can put it up completely so that the Court can see how this Dade County area fits into South Florida. And if I could, could I have this exhibit marked as Government Exhibit 40?

* * * *

[39] THE WITNESS: Oh, I'm sorry. In the De Grandy plan, the 36th senatorial district retains a 55 percent Hispanic VAP. And it does so, as you notice, by including the Roads section of Little Havana into the district. You notice here, it goes inland, here it does not (indicating). Here the Roads section is part of senatorial district 34. Here it's part of senatorial district 35.

So, instead of I guess three super majority Hispanic districts, you have three super majority Hispanic districts: the 33rd, the 40th and the 37th—I mean, the 33rd, the 40th and the 34th and one majority Hispanic district of 55. This is [40] 71 and these are both over 65. So, you have a—you retain a Hispanic majority district; the 71.5, 66.2 and 66.1.

The other difference is—

BY MR. HEBERT:

Q Could we go back and do that just a little slower so that I make sure we understand. The district under this proposed De Grandy plan that is 71.5 percent Hispanic is this purple area?

A Is the 40th.

Q The district that's 66.2 percent Hispanic—

A I think it's the 34th.

Q The green one.

A And the 66.1, which I think is the 33rd, but that could be reversed.

Q And then which one is the 55 percent?

A The 35th.

Q So, there are four districts in that plan that are majority VAP Hispanic?

A Yeah; three super majorities and one majority.

The other difference is that it creates two black majority districts, one the 36th, which basically starts at the Liberty City/Overtown area.

JUDGE STAFFORD: I thought you said 36 was 55 percent Hispanic?

THE WITNESS: What?

[41] JUDGE STAFFORD: I thought you said 36 was 55 percent Hispanic?

THE WITNESS: No, 35th; it's 35th that's 55 percent.

JUDGE STAFFORD: All right. Excuse me.

THE WITNESS: You see the problems of the experts now.

Now, the 36th is a black majority district. It starts off in the Liberty City/Overtown area, parts of Opa-locka, follows US1 and picks up the black pockets of Coconut Grove, South Miami, Perrine, Goulds, Leisure City, Homestead, all the way down to Florida City. So, it follows the pattern of the black Congressional district you approved for Dade.

And then, by up here, by keeping the black sections of Carol City, Opa-locka and uniting them with the black pockets in Broward County, you create a second majority black district, which is the 32nd.

JUDGE STAFFORD: What's the other one called?

THE WITNESS: 36 and 32.

BY MR. HEBERT:

Q What I would like you to do is before, when you were talking about the demographics in Dade County, you talked about a belt of Hispanics. Could you relate the districts as proposed in the De Grandy plan under Exhibit 41 to the demographic belt and describe how it treats that belt of Hispanic population.

A All right. The De Grandy plan includes the South Beach [42] section of Miami Beach, Key Biscayne and the Roads section of Little Havana and puts them in the 35th district. Then you have US1 as a barrier so that the Afro-American district can pick up the black pockets in the south. And then you start with the rest of Little Havana, West Miami, Olympia Heights and parts of Kendall, to create the 34th district.

The 40th district has most of Westchester, all of Sweetwater, wraps around basically unpopulated areas here and comes back to include Kendall Lakes, Kendall (indicating). And so that's how—and Hialeah is basically included into the 33rd district. And it's combined with non-Hispanic white neighborhoods of Miramar and Pembroke Pines to reduce its VAP, so you won't have packing.

So, that's how the—so, basically the Hispanic neighborhoods are respected, treating as contiguous and there is respect for the Hispanic enclave. It does not fractionalize the Hispanic enclave the way the State plan does, does not—you don't have large pockets.

I believe that in the State exhibit you have 28 percent of the Hispanic population of Dade County living in State senatorial districts which they can influence the outcome, while in this plan you have about ten percent of the Hispanics in Dade County living in districts where they can influence the outcome. For Hispanics, that's the difference between.

[43] Here you lose—28 percent of the Hispanic population are submerged in either black or non-Hispanic white districts. Here, only ten percent of the Hispanic population is submerged in non-Hispanic white and black districts.

* * * *

[44] Q Okay. What I'm wondering is, if you know—and if you don't know, just say so—how does the De Grandy plan impact on the black districts drawn in the Dade County area? Are they equally the same population statistics as that set forth in the State's plan or does it weaken those districts for the African American populations?

A I think the two Afro-American districts that are created on—I believe the State plan had a—if you count Hispanic blacks—one majority Hispanic black, one majority black district and one black influence district while the De Grandy plan creates a very strong black majority district. I think 57, I believe is the figure. And it creates

another black majority district incorporating the black pockets of Broward County.

* * * *

[46] Can you identify this plan for us? This is Exhibit 42.

A Yes; this is the Reaves/Brown plan, I believe. And what the Reaves/Brown plan does, it also has four Hispanic majority districts, but instead of the 35th district only being 55 percent Hispanic, it is now 62 percent Hispanic. So, what the—what the Reaves/Brown plan does, it improves—it makes the 35th district a more solidly Hispanic district by removing some of the anglo sections of Miami Beach and putting them in a new 38th district and picking up more of the Little Havana area while retaining super majority Hispanic districts in the 34th, 40th and 33th senatorial district. So, this actually helps Hispanics more.

It also retains two Afro-American districts, a 36th district, much like the De Grandy plan, and a 32nd district, much like the De Grandy plan, including the North Dade black neighborhoods, connecting them with the Broward County Afro-American neighborhoods.

MR. HEBERT: - I would like to have marked as Government Exhibit 43 a chart which basically sets forth much of what has been testified to, but it sets out the voting age population of Hispanic population in these Dade County senatorial districts as set forth under the Senate plan, which by the way is now [47] Plan 330, but it is the same percentages. The NAACP had proposed a plan. We're not going to get any testimony about that. The Senate—the Senate's plan itself. I'm sorry, this was an alternative plan in the Senate, the first one. The De Grandy plan and the Reaves/Brown and Hargrett plan. And this is really just for informational purposes. And the statistics are set forth in those books that we have, but this will be Government Exhibit 43.

BY MR. HEBERT:

Q And just to recap, there are four districts, you said, under the Reaves/Brown plan that are over 62 percent Hispanic?

A Sixty-two will be the 35th and then these are the three super majority districts: the 34th, the 40th and the 33rd.

Q And those are voting age population majorities?

A And those are voting age population, yes.

* * * *

[48] Q And if you could, Doctor, could you highlight for us just very quickly how the State's plan compares to the DeGrandy and Reaves/Brown plan in terms of voting age population majority for African Americans?

A Well, for Dade County, the plan only creates—the state plan—only creates one majority Hispanic, one majority black district and an influence district.

* * * *

[49] Q So, there are only two districts where sizable concentrations of African Americans are set forth in the State's proposed plan in the Dade County area? One is 52.5 percent VAP African American and the other is 34.5?

A Right. And the Reaves/Brown, the two districts will be 59.7 and 58.4 being the 36th and 32nd, and in the De Grandy is 57.3 and 57.1, again the 36th—

* * * *

[52] JUDGE STAFFORD: In any event, when you're talking here, when you say Hispanic majority district, you're talking voting age population?

THE WITNESS: Yes, sir. And when I refer to a super majority district, it refers to a district that is over 63, 64 percent, near 65 percent Hispanic, which will probably perform.

JUDGE STAFFORD: Voting age population?

THE WITNESS: Voting age population.

* * * *

[53] JUDGE STAFFORD: Well, go ahead. If that's an objection, it's overruled. Go ahead.

BY MR. HEBERT:

Q Dr. Moreno, is there—have you formed an opinion at all with regard to the districts in the De Grandy plan about whether any of the majority voting age population Hispanic districts are districts in which Hispanic voters, based on past voting patterns, registration rates and turnout rates or whatever, based on that type of election information, whether those districts are likely to result in Hispanic candidates getting elected in an election contest for the Senate?

MR. ZACK: I object to the form. I object to the form of the question. No proper predicate has been laid for his ability to answer that question.

MR. HEBERT: Your Honor, if I may, counsel here is trying to draw a distinction between performing districts and voting age population districts. Counsel knows full well there is no distinction between such things in Dade County and this witness is about to testify to that.

JUDGE STAFFORD: What is your question to the witness?

[54] MR. ZACK: I disagree.

MR. HEBERT: Well, you can disagree.

JUDGE STAFFORD: Now, wait, gentlemen; you address your comments to the bench. What is your question?

BY MR. HEBERT:

Q Do you have an opinion, sir, with regard to whether or not any of these districts in the Dade County area that you've described as voting age population majority districts, whether those districts are districts in which Hispanic voters are likely to effect the outcome of the election?

A I would say—

MR. ZACK: My objection, Your Honor, is no proper predicate has been raised to establish that he has reviewed

that, what is the basis for his review or the basis for his response.

JUDGE STAFFORD: I'll let you handle that on cross examination. Proceed. Objection overruled.

THE WITNESS: I have high confidence that on the 33rd district, the 40th district and the 34th district, Hispanics will be able to elect a candidate of their choice. I have less confidence in the 35th district—there is only a 55 Hispanic VAP—that Hispanics will be able to elect a candidate of their choice.

JUDGE STAFFORD: All right. Next question.

BY MR. HEBERT:

[55] Q All right. I would like to ask you the same question with regard to the Reaves/Brown plan with regard to the Hispanic voting age population district.

A Again, I have high confidence that—I just want to make sure I'm using the rights numbers.

JUDGE STAFFORD: Would your answer be the same?

THE WITNESS: My answer would be the same except I will have greater confidence with a 62 percent VAP in the 35th district that Hispanics will be able to influence the outcome. But I think that that's a problematic assumption because of some of the demographics of that district.

BY MR. HEBERT:

Q Could you describe what some of that is?

A Well, part of the problem with the 35th district—with the 35th senatorial district—as I mentioned earlier, these are a great deal of recent arrivals. A lot of the people from the Mariel boatlift settled there in the early 1980's, especially in the South Beach area. A lot of elderly who are going to die as Cuban citizens, come what may.

So, the Hispanics are less likely to register and less likely to vote in an election than in other parts of Dade County.

Q Is it true that with regard to both the Reaves/Brown and the De Grandy plan that you are—

MR. ZACK: I object to the form of the question. Your [56] Honor, I just can't let him keep testifying in his direct examination.

MR. HEBERT: Well, this witness obviously has given me an answer that I'm entitled to zero in.

JUDGE STAFFORD: Objection overruled. Go ahead.

BY MR. HEBERT:

Q Isn't it true, Dr. Moreno, that with regard to three of the four majority Hispanic districts under both the De Grandy plan and the Reaves/Brown plan, that there—that you are confident that in three of the four districts in Dade County, Hispanic voters will elect their preferred candidate? You don't have any dispute about that; do you?

A I have no dispute about that.

Q All right. And isn't it also true, Dr. Moreno, that with regard to the 4th district in the Reaves/Brown plan, that the Hispanic voters at a minimum have an equal chance of electing a candidate of their choice with the anglos?

MR. ZACK: I've gone the limit.

JUDGE STAFFORD: Okay. The first word ought to be "objection" and then let me handle it.

MR. ZACK: Excuse me, Your Honor?

JUDGE STAFFORD: Your first word when you are up is "objection" and then I'll know how to handle it.

MR. ZACK: Objection.

JUDGE STAFFORD: It is leading; go ahead.

[57] MR. ZACK: Beyond that, I have an additional, that it's not just leading; it misstates the testimony. He said it has ability to influence, which is clearly not the issue in this case.

JUDGE STAFFORD: All right. Let's restate the question. The objection is sustained. Let's restate the question. Come on.

BY MR. HEBERT:

Q With regard to the 4th district—
JUDGE STAFFORD: Which 4th district?
THE WITNESS: The 35th.

BY MR. HEBERT:

Q And, again, the district, the 35th district under Reaves Brown, which is 62 percent Hispanic, do you know of any 62 percent Hispanic voting age population district in the Dade County area that has not elected a Hispanic?

A I can't answer that.

Q Do you know of any? You can answer that: can't you?

MR. ZACK: Objection, Your Honor. He doesn't like the answer. He answered it. He can't answer it.

JUDGE STAFFORD: Objection overruled. Let's go. You don't know of any; right?

THE WITNESS: I don't know of any.

JUDGE STAFFORD: Next question. Let's go.

MR. HEBERT: Your Honor, at this point I am through [58] with my questions on the Senate.

* * * *

[63] A I did not analyze the NAACP plan so I cannot comment that they are the same.

* * * *

[65] Q And you have already determined that the De Grandy 55 percent does not perform?

A I did not say that. I said that the likelihood of it performing is problematic. I mean, I guess what I am saying is—

* * * *

[66] What I meant by problematic is that currently the district is 55 percent, about 55 percent Hispanic, and, but it's represented by a very powerful non-Hispanic white incumbent who has an ability to raise a lot of money. That incumbent Jack Gordon has since retired.

So in an open election, 55 percent Hispanic VAP is still probably too low to guarantee—to, to say that that district will perform with any level of confidence.

* * * *

[75] Q In the registration data in Dade County on Hispanics, the people that they classify as Hispanics are only those born outside the United States or in Puerto Rico, isn't that correct?

A That is correct.

* * * *

[76] Q All right, sir. Now, what studies did you perform to determine registration and citizenship rates in the H, R & B plan in number 35, district number 35?

A I haven't done any.

* * * *

[77] A No. No, that is not what I said. I said that's a, I said that's a, there were more, there is more, I mean, in your plan the 38 is also an Anglo seat and the40 is the largest ethnic group would be non-Hispanic what's also—

Q Okay. What would happen if this court adopted the De Grandy plan? Would there, there are five hundred eighty-five thousand Anglo voters in Dade County.

If there are four Hispanic seats and two black seats, are there any seats for the five hundred and eighty-five thousand voters that are non-Hispanic and non-black in Dade County?

A Well, you, if you—

Q Any?

A If you look at the De Grandy plan the, their [78] district 39, which is the blue area, light blue area—

* * * *

JUDGE STAFFORD: Okay.

* * * *

[80] Q Okay. My question was, how many of the five hundred eighty-five thousand candidates, five eighty-five thousand citizens, white citizens non-black, non-Hispanic are, can elect a candidate of their choice in Dade County?

* * * *

[82] THE WITNESS: The only way, I didn't bring my census data with me to the stand. In fact, I left it in Miami Beach. But the, whatever the population at Adventura and the population of east Kendall would be the answer to that question.

BY MR. ZACK:

Q We have added it up, and it comes out to four hundred thirteen thousand—five hundred eighty-five thousand.

Does that sound about right to you, sir?

A It sounds a little high.

* * * *

[84] Q Okay. So you don't know that whether they vote Republican or Democrat? You just don't know? Is that what you are telling this court?

* * * *

[85] A The problem is that there are no identifiable Nicaraguan precincts in Miami proper.

Q Of the Colombians, have you made the same study?

A There are no identifiable Colombian precincts in Dade.

* * * *

[86] doesn't make any difference, it doesn't make any difference whether they voted Democrat or Republican.

That race, my question for that case, Your Honor, was whether they voted for the Cuban or the Puerto Rican. That was my question.

In the other cases I said Democrat or Republican, specifically asked for whether the voted for Cuban or the Puerto Rican. You can verify that in the record. That is why I asked it that way, Your Honor.

JUDGE STAFFORD: All right. Let's go on.

BY MR. ZACK:

Q All right. Is your same answer as far as whether the Dominicans vote Democrat or Republican, you don't know?

A We don't know.

Q And as far as Hondurans, you don't know?

A We don't know.

Q And as far as Peruvians, you don't know?

A We don't know.

Q And as far as Guatemalans, you don't know?

A We don't know.

Q And in your table in number three in your report, those groups constitute 40.7 percent or a little less than half of all the Hispanic voters that you are trying to lump together, isn't this correct?

A Yes, that is right, but what we do is because [87] these voters are identified as Hispanic by the Dade County registrar of voters, when we do have voting behavior we don't separate Cubans, we don't separate Latins.

* * * *

[91] A No, that is not correct. We know how Hispanics vote because we do, we do precincts analysis on Hispanic districts that are over 70 percent. These 70 percent Hispanic districts which are not totally Cuban-American districts were mixed.

If you go to Sweetwater, for example, the districts are 50/50, Cuban-American, Nicaraguans. We know how that district looks, the same with Windward, the same with all areas of Dade, the Hispanic, we do the analysis not by Cubans not my Nicaraguans, not by Peruvians, but by Hispanic.

* * * *

[92] Q Okay, sir. Now, tell us in your polarization studies, first of all, are you experienced in conducting an ecological regression analysis?

A No, I am not.

Q Isn't an ecological regression analysis a fundamental principle that must be dealt with in your polarization study?

A No, homogenous precincts, that is what I use.

Q There are two ways of doing it?

A Right.

Q And as far as homogenous precincts is there also, where did you determine, what was your cut off in your homogenous precincts? 80 percent? 90 percent?

A 70 percent.

Q 70 percent? Some people would say 80 percent and 90 percent, too, right?

A The problem is that, as you mentioned yourself, that the Dade County registrar of voters, and this is why I use the homogenous precincts, the Dade County registrar of voters only counts as Hispanic those born outside the United States, and those born in Puerto Rico. That is why there is an undercount of Hispanic voters. So you cannot get Hispanic districts that are 80, 90 percent, because they are not counting all the Hispanics.

So 70 percent Hispanic districts are, will [93] probably be equivalent to 80, 85 percent.

Q Probably, but that is a guess on your part, isn't that—

A It's not a guess, it's an educated guess, when you compare it to the census study which has those same precincts always the on, 92 percent Hispanic.

* * * *

[96] Q Okay. And the races that you looked at, however, the Cubans that ran were the candidates of choice of the Cuban community, isn't that correct?

A That is correct.

[97] Q And they all won?

A Right, but—

Q Isn't it true, sir?

A But the point I am trying to make is that it, that one of the problems you have in these kinds of issues is the fact that minorities are scared away from running when faced with powerful incumbents, in other words, we have—

Q You just said Jack Gordon retired.

A We have gotten so good at redistricting and designing districts to protect incumbents that no Hispanic would challenge Jack Gordon in the 35th congressional district or Plummer in the 39th con—in the 35th senatorial district or Plummer in the 39th senatorial district.

* * * *

[100] Q Okay. Do we have Cuban City-County Commissioners?

A Yes, but—

[101] Do we have a Cuban mayor?

A In Miami?

Q Yes.

A Yes.

Q Do we have three Cuban senators?

A State senators, yes.

Q State senators? Do we have a Cuban congresswoman, the first one ever elected in the United States?

A Yes.

Q And that was from Dade County, right?

A That is correct.

* * * *

[103] A Between 30 and 40, sounds about right.

Q And you would agree, would you not, that they would not be politically adhesive with the elements of Hispanics who are Republicans?

A No, I would not agree with that, because if you look at the election where the Republican Hispanic has ran they have carried in the neighborhood, anywhere between 70 and 80 percent of the Hispanic vote.

Q So you would say that Hispanic vote in Dade County—

A For a, if Hispanic Democrats—if we look at the, if we look at the figures, tend to vote for Hispanic Republicans when they have an opportunity to.

* * * *

[106] A I would guess that they, yes, they are.

Q You would agree that there are a high percentage, and I will use the word "illegal" Hispanic aliens in South Florida, Dade County, is that correct?

A There are a number of illegal aliens in Dade County.

Q They do not vote?

A They do not vote.

Q And they live in pockets in different parts of Dade County, is that correct?

A Yeah. The thing to remember, though, is that these people don't show up on census.

Q I understand.

A You know, so we don't know their numbers or because if you are illegal you are not going to answer the census data.

Q But would you agree that there was adjustment made for that type of residents in the census count?

A I, from my view of the census count, and the census is standing about seventy-four thousand, I don't see an adjustment.

* * * *

[109] Q Okay. Do you have any evidence in Dade County that whites bloc vote against Hispanic Republicans in primaries in Dade County?

A Excuse me.

Q Whites bloc vote against Hispanic Republicans in Republicans primaries in Dade County?

A In Republican primaries, no.

Q Do you have any studies indicating the extent of white bloc votes against Hispanic, and if so which elections?

A Yes, I, the County Commission race between Pinellas and Valdez.

Q In the—

A And the Art Simon race against Orlando Cruz in 1990.

Q Any others?

A And then the unsuccessful attempts Souto-Easterly, Gutman-Leifman, Marina-Braddock, that was successful for County School Board, Clerk of the County Court, Cotarelo-Ader, 1988 State Senate, Souto-Anderson, 1986, Zack-Ros-Lehtinen, Regan-Souto, State House 105, and [110] Marina-Garcia 1984 State Attorney.

Q So your white bloc vote includes based upon the study of eight to 10 elections?

A Yeah.

Q And that's all

A That's all.

Q What did you limit your studies to?

A I limited, I limited my study to in these cases to races where there was an identifiable candidate of choice by Hispanic—

Q Have you seen any reports or done any reports indicating how Martinez, the 1990 gubernatorial candidate would have performed in the proposed De Grandy districts?

A No, I have not.

Q He was Hispanic.

A Excuse me?

* * * *

[124] JUDGE HATCHETT: Please be seated.

Dr. Moreno, everything I am going to ask you about you have already testified to, but the judges have to study at night and we don't want to carry these exhibits away because the lawyers need them, so I am going to ask you some questions so that we may create [125] our own little chart here.

THE WITNESS: Okay.

JUDGE HATCHETT: And I suppose you will need to ask someone to hand you those charts as I ask you these questions.

As to Hispanics in Dade County, today we adopted plan 330 which I call the Supreme Court plan.

THE WITNESS: Uh-huh.

JUDGE HATCHETT: What is the number of majority Hispanic districts under 330, the Supreme Court plan?

THE WITNESS: Three.

JUDGE HATCHETT: What I want you to do now is tell me the district numbers under that plan that you are referring to and the percentages.

THE WITNESS: Okay. Let me find my thing with the--

JUDGE VINSON: You have a chart that has all of that on it.

JUDGE HATCHETT: It's down there someplace.

THE WITNESS: Okay. District 39 would be 76.07 Hispanic VAP under the Senate plan.

District 34 would be 66.33, and District 37 would be 64.28.

JUDGE HATCHETT: All right. Will you do the same thing for the De Grandy plan, 275?

[126] THE WITNESS: Okay.

JUDGE HATCHETT: How many districts first?

THE WITNESS: It creates five Hispanic majority districts, district—that—leave the numbers there. I'm sorry.

District 40 will be 71.5.

JUDGE STAFFORD: What is that number?

THE WITNES: 40.

JUDGE STAFFORD: 40 is what?

THE WITNESS: 71.5, District 33 and 34, I don't know if it's 66.2—66 percent—

JUDGE HATCHETT: Go ahead.

MR. ZACK: Your Honor, you want us to help here? There's mistakes being made.

JUDGE HATCHETT: Yes, I suppose we do.

MR. ZACK: I, it's district number 33 is 71.5, not 40.

THE WITNESS: Okay.

JUDGE HATCHETT: Is that correct?

MR. ZACK: And it's four districts not five. I mean, I don't know—

THE WITNESS: I said four districts.

JUDGE STAFFORD: You said five.

JUDGE HATCHETT: You said five.

THE WITNESS: Sorry.

[127] MR. ZACK: I don't know. I hate to interrupt but—

JUDGE HATCHETT: Well, any way we can get the information is fine. I just thought that would be a way of doing it.

Let me just ask you and see if we can't all agree on it.

All right. There are four majority Hispanic districts under the De Grandy plan.

Now, let's talk about district number 40. What is the percentage for district 40.

THE WITNESS: 66.

JURGE HATCHETT: 66 Mr. Moreno says. Anyone differ with that?

MR. ZACK: 66.2.

JUDGE HATCHETT: 66.2? District 33?

THE WITNESS: 66.1.

MR. ZACK: 71.53.

JUDGE VINSON: We have already gotten—

JUDGE HATCHETT: Well, I was going back over 33 to make sure we got it right, 71?

MR. ZACK: Point 5.

JUDGE HATCHETT: 71.5? You agree with that, sir?

THE WITNESS: Yeah.

JUDGE HATCHETT: All right. What are the other [128] two districts and what are the percentages?

MR. ZACK: It's 34, Your Honor, is 66.1.

JUDGE HATCHETT: Do you agree with that?

THE WITNESS: And 35 is 55 percent.

JUDGE HATCHETT: 55.7?

JUDGE STAFFORD: Which number?

THE WITNESS: 35.
MR. ZACK: 55.0.
JUDGE HATCHETT: 55.0? 55.7?
THE WITNESS: 55.0 is what I said.
JUDGE HATCHETT: All right.
THE WITNESS: I'm sorry.
JUDGE HATCHETT: I want the same information until the 330 plan as to black districts in Dade County. How many are there?
THE WITNESS: Black districts in there are two, the 32, district 32, the black VAP is 57.1.
JUDGE STAFFORD: 57.1?
THE WITNESS: 57.1. 32—
JUDGE VINSON: Which plan are we talking about now?
THE WITNESS: This is De Grandy.
JUDGE HATCHETT: No, we want first the Senate. 330.
[129] THE WITNESS: Oh, 330?
JUDGE HATCHETT: Under 330.
THE WITNESS: Oh, 330 in the Senate?
MR. ZACK: Your Honor, 36 is 52.5.
JUDGE HATCHETT: 36?
MR. ZACK: Yes, Your Honor.
JUDGE HATCHETT: 52. 5?
MR. ZACK: And 30 is 51.7.
JUDGE HATCHETT: District 30, that is a majority district.
MR. ZACK: Yes, Your Honor, 51.7.
JUDGE HATCHETT: 51.7?
JUDGE STAFFORD: Which district?
THE WITNESS: Broward.
MR. ZACK: Broward and Palm Beach.
JUDGE STAFFORD: The number, please.
MR. ZACK: Excuse me, 30, Your Honor.
JUDGE HATCHETT: In other words, 36 and 30 are the two districts?
MR. ZACK: Yes, Your Honor.

JUDGE HATCHETT: 32 is under the De Grandy plan, is that right? There is no 32? It's a majority black district under the Senate plan, 330?
MR. ZACK: That's correct. There's two majority under each but they are different numbers.
[130] THE WITNESS: Yeah, the, their majority is not in Dade, it's in Broward and West Palm.
JUDGE HATCHETT: Yeah, I am only interested in Dade.
All right. So the, there are two in Dade, 36 and 30 are the district numbers. 36?
THE WITNESS: One in Dade.
MR. RUMBERGER: There is only one in Dade, Your Honor.
JUDGE HATCHETT: One in Dade?
All right. Now, De Grandy the same information, how many black districts?
THE WITNESS: There are two.
JUDGE HATCHETT: All right.
What are the numbers?
THE WITNESS: 36 which is 57.3, and 32 which is 57.1.
MR. ZACK: Your Honor, only a third of 33 is in Dade. That is not correct to say that the Dade County seat for—
JUDGE VINSON: You said 33. You meant 32?
THE WITNESS: That is 32.
MR. ZACK: 33 percent of 32 is only in Dade, the rest is in Broward.
JUDGE VINSON: Well, you are saying district 33, [131] but it's district 33, isn't it?
MR. ZACK: Yes, there is only one each in Dade County.
JUDGE HATCHETT: All right.
JUDGE VINSON: Well, while you are giving us the numbers, can give us the same numbers of the Reaves, Brown?
THE WITNESS: Okay. In the Reaves, Brown plan, they ran—

MR. RUMBERGER: Hold it up.

THE WITNESS: For the Hispanic districts, district 33 is 66.8, district 33 is 66.8, district 34 is 65, District 35 is 65, and district 40 is 62.1.

JUDGE HATCHETT: 63. 1?

MR. CARDENAS: 62.

JUDGE HATCHETT: 62?

JUDGE VINSON: Black percentages?

THE WITNESS: The black percentages in district 32, 58.8, on district 36, 59.7.

JUDGE HATCHETT: Thank you, Doctor.

No other questions.

JUDGE STAFFORD: You may step down.

MR. ZACK: 32 is 44 percent in Dade County.

JUDGE STAFFORD: You may step down, Dr. Moreno.

* * * *

[263] Q Now, what I would like you to do at this point, Doctor, and maybe we can speed this up, I can simply ask you the questions, would you tell us, please, what the differences are in the treatment of the Hispanic population between the State's proposed House plan in the Dade County area and the De Grandy plan as you have outlined it here?

A If we can we can switch to this map which is the State paln and here, no here, and has the old Hispanic, the Hispanic enclave which they talked about yesterday.

I think when I see the State plan as far as its treatment of Hispanics, I am drawn almost immediately to District, State District 116 which is I believe 48 percent Hispanic and the rest non-Hispanic whites, and some black voters here.

The, if you look closely, the line of 116 separates these heavily Hispanic neighborhoods in District [264] 112 from the rest of the Kendall Lakes area and the Kendall area.

So basically what the State plan does it puts a barrier here between these neighbors making up the same, basically what is the same housing development in Kendall Lakes.

In creating District 112, if you will look here at the shape of 112 which includes this, includes all this area here, and heavily Hispanic areas here in Kendall, and then goes through what is basically an empty industrial park Medley, to connect with communities here in Hialeah Gardens.

* * * *

A —the House separates the traditional, what is a continuous neighborhood here in West Kendall, and connects it to Hialeah Gardens which, in fact, there is no direct road transportation between these neighborhoods and this neighborhood up here in Hialeah Gardens.

Similarly in 116, if you notice District 114, [265] State District House District 114, it is almost solidly Hispanic. It is over 78 percent Hispanic.

The little white area you see in Florida International University where it's, you know, empty, so the, in order to create, in order to create a safe district, the House packed 114 and then created this district which basically broke up a continuous neighborhood in Kendall.

Similarly the House, if you notice, created this Hialeah to East Naples District in 102, basically breaking up this part of Hialeah and these Hispanic communities and basically connecting them with non-Hispanic whites in East Kendall.

And as the Court knows, and East Naples, and as you know Naples is a high growth area. That in 102.

Furthermore, the House plan breaks up continuous Hispanic neighborhoods here in District 109 which is a predominantly Afro-American district.

The percentage of Hispanic voters in District 109 is 30 —is a little over 38 percent, I believe, and as you notice the Hispanic neighborhoods here are really, you know, are really part of the same Hialeah neighborhood, all right, coming in here.

Q So that Hispanic population you just referred to is actually put into a majority black voting age population?

A Right, submerged into that district.

[266] And the same happens to a lesser extent in House District 103 where you have the, a very, a large Hispanic community which makes up about 30 percent of District 103, which is actually part of this non-incorporated Northwest Dade-Miami Lakes area here.

It's also submerged in a black neighborhood, and you see it's, it would have been quite easy to just make that part of that district.

Q For the record, I should show that Dr. Moreno is referring to Government Exhibit 50 which is a demographic blow-up of Dade County with the House District superimposed; and, further, that the color codes that we have been dealing with here, Hispanics are in blue, blacks are in red, and those that are yellow are a minority mix similar to the one that we had with the Senate.

One thing that I neglected to do was with the De Grandy plan was give you the four black districts which they also have the percentages of that are majority black voting age population.

District 102 which is 56.—I'm sorry—57.6 percent black. District 103, 57.8 percent black VAP. District 106, 57.7 percent black VAP; and 107, which is 57.3 percent black VAP.

Now, if we could, I would like you to contrast the treatment of the Hispanic population under the plan that [267] you have just explained for us unless—were you through?

A Yeah. Yeah.

Q Okay. And the treatment the Hispanic population under the De Grandy plan, and we will put those two side by side, we have the DeGrandy here on the left-hand side, and we have the State's plan here on the right-hand side, and those are the Exhibits 49, the De Grandy plan, and 48 for the State proposed House plan.

A Okay. To avoid the kind of packing that we saw in District 114, this is the State plan, what the De Grandy

plan does it creates districts which are thinner and longer which includes, if you imagine the Hispanic enclave coming down like this, what the De Grandy plan does, it includes portions of that enclave and then comes down here to pick up non-Hispanic white voters to avoid the problem with packing.

The De Grandy plan also keeps the East—the West Kendall neighborhoods together by creating a Hispanic 116 District.

You don't have the distortion of a district going all the way to Collier County in 102—that you did with the State plan in 102, and similarly important the De Grandy plan reduces the number of Hispanics which are submerged in predominantly black districts, going over, and the 102 district in the De Grandy plan which is 57 percent black is only 14 percent Hispanic.

[268] The 103 district which is 57.8 percent black is only 20.7 percent Hispanic.

The 106 is 24.7. The 107 is 15.2. So the De Grandy plan does a much better job in terms of keeping the Hispanic VAPs in predominantly black districts down from 14 to 24—24.7 percent while the State plan goes from 16.4 percent to 38.8 percent, so I think that is a significant difference between the treatment of Hispanic in the, in both plans.

Q The districts in the State's plan, the black districts that contain a Hispanic population, you said two of them in excess of 30 percent Hispanic.

A Are 109 and 103.

Q Are those Hispanics added to that district in order to increase the population, the minority population of that district so that a black could be elected?

A If you, if you look at my affidavit when I talk about polarized voting, and some of the other expert testimony, the voting behaviors of Dade and Monroe, are that blacks and Hispanic tends to be quite polarized and very rarely come together in a coalition.

So it is more likely to add to ethnic tension by putting that large number, especially at 38 percent Hispanic population in a predominantly black District than to lead to some sort of election coalition.

TESTIMONY OF ALLAN LICHTMAN

TR VOL. III

* * * *

[69] A. Run that by me again.

Q. All right. Has it not been your practice in many cases, in Lyco County, for example, comes to mind—in fact, I think you did this in Hardee County as well, and there are probably other examples—where you have taken the Hispanic support for the Hispanic candidate—

A. Yes.

Q. —added to that the white crossover anticipated—

A. Yes.

Q. —and in this case, the black crossover—

A. Yes.

Q. —and then compared that with the anticipated white vote for the white candidate, black vote for the opponents, and so forth. Is that not your standard practice?

A. I have done both recompiled election results and this technique that you've pointed out, yes.

Q. And did you use that technique in this case?

* * * *

[72] Q. Doctor, would you agree whether Hispanics are going to elect a candidate of their choice in any of the districts as constituted is going to be in part a function of their turnout?

[73] A. Yes.

Q. Would you also agree that turnout is a part of the function of citizenship?

A. Yes.

* * * *

[80] Q. Isn't it the case, then, that if the Hispanics are not the majority of the folks who show up at the polls on election day, that the fate of the Hispanic candidates are going to be in the hands of white voters?

A. No, because it also depends upon the degree of Hispanic cohesion; and, to some extent, of course, you factor in the degree of white support for Hispanic candidates as well. You don't assume that whites vote a hundred percent against Hispanics. That's why you do bloc voting calculations and cohension calculations to determine whether, under a given system, whites vote sufficiently as a bloc to defeat the candidates of choice.

* * * *

[83] Q. Dr. Lichtman, that's not the question I asked you. The question I asked you is: How often in these elections that you looked at that this polarized voting resulted in the defeat of Hispanic candidates?

A. That, I don't know, but most of these elections are in districts with the Hispanic majority. Hispanics are not competing in the white majority districts.

Q. You yourself have indicated the difference between polarization and whether that polarization is legally significant, I believe.

A. Yes.

Q. And it becomes legally significant, Doctor, if it results in the defeat of Hispanic candidates, does it not?

A. That doesn't require Hispanic candidates to be competing in white districts and be defeated. The polarization here is sufficient to show that, in a situation where you have white districts, white bloc voting would be sufficient to defeat an Hispanic candidate of choice in the Hispanic community. Whether or not an Hispanic choose to compete under such circumstances of extreme bloc voting in white districts is another matter.

Q. Doctor, again, we're not answering the question that I would like answered. The question is how—

* * * *

[84] Q. How often have Hispanic candidates of choice been defeated by polarized voting in Dade County, state legislative elections?

A. I can't answer that.

Q. Would you believe that the answer is one, in all of the contests that you've analyzed?

A. That's quite possible, because they are not competing in white districts. They were competing in Hispanic majority districts, which is a typical pattern you find when there is polarized voting.

Q. Would you agree, Doctor, assuming that that's right, one loss, that it is not possible to say in this case that the candidates of Hispanic voters choice usually lose in Dade County?

A. It is possible to say that polarized voting shows that white bloc voting is sufficient to defeat the candidates of choice. If they are not competing, of course, I can't conclude what you are asking me to conclude.

* * * *

[85] Q. You've also said, Doctor, in Paragraph 8, you point out that the black voters haven't provided very much support for Hispanic candidates, either; is that correct?

A. To the extent they were able to isolate information on the black voters, yes.

Q. Are you aware of any contest in which the black voters failure to support Hispanic candidates resulted in that candidate's defeat?

A. The same answer, they are competing in majority Hispanic districts.

Q. Any of them lose?

A. Maybe one.

Q. Do you by any chance know, Doctor, what the political affiliation was of the Hispanic candidates who were successful in the state legislative contest?

A. I haven't gone through one-by-one, but I presume they were mostly Republicans.

Q. Would you accept that they were all Republicans?

[86] A. That sounds feasible.

Q. You have also looked at the school board contests for Dade County; is that correct?

A. To the extent there were any other contests reported by the state, I included them, yes.

Q. Are you aware that no Republican has ever been elected to the Dade County school board?

A. I'm not aware.

Q. I'll ask you if you will accept that as a true statement, no Republican has ever been elected.

A. Fair enough.

Q. Would that suggest to you, then, that in a school board contest—let me back up. Strike that question.

In your analysis of the school board contest, you did show that some Hispanic candidates were not successful?

A. My analysis was not designed to show who was and who was not successful; but, yes, the Hispanic candidates were not successful.

Q. And to your knowledge were these Hispanic candidates running as Republicans?

A. Most likely.

Q. And so, if they were running as Republicans, and no Republicans have ever been elected, is it fair to say that the polarization is just as likely to have been partisan as to have been racial in those contests?

[87] A. I didn't get into the causes of polarization as to why voters voted as they did. I simply looked at how voters voted.

Q. And indeed this was the case, isn't it, that Tiel, a black Republican, received support from the majority of Hispanic voters?

A. We never verified that, but that is certainly possible.

Q. That being the case, wouldn't that be a further indication of partisan rather than racial polarization?

A. I wouldn't draw that distinction that you draw. Certainly, it is the case that partisanship is an influence on voting.

* * * *

[95] Q. But you made no specific determination of the citizenship in Dade County?

A. That is correct.

* * * *

[99] A. A quarter of the district, you said 23 percent?

Q. Something like that, yes, sir.

MR. ZACK: There are only six contained in Dade County one hundred percent, the ones I read. There is one that has a small portion of it.

THE WITNESS: Twenty-three percent.

MR. ZACK: Twenty-three percent, six are contained in Dade County.

THE WITNESS: So it is slightly under half, six and a quarter districts in Dade County, and you've got three, that's a little under half.

BY MS. BUTLER:

Q. Doctor, you have to agree, would you not, that that is awfully close to a proportional representation for Hispanics in Dade County—half of the population, half the districts?

A. It's slightly less than half of the districts, slightly more than half the population.

* * * *

TESTIMONY OF LEON RUSSELL

TR VOL. III

[106] DIRECT EXAMINATION

BY MR. BURR:

Q. Would you state your name for the record, please?

A. Leon W. Russell.

Q. Where do you live, Mr. Russell?

A. In Clearwater.

Q. Do you hold a position at the present time with the Florida State Conference of the NAACP branches?

A. Yes, I'm the first vice president of the state conference.

Q. What role, if any, have you played in the reapportionment process here in Florida over the past year and a half or two?

A. I have basically directed the state's reapportionment redistricting projects. I have participated in the drawing [107] of maps and, obviously, earlier in this proceeding.

Q. Have you attended any of the public hearings that the House and Senate reapportionment committees held with respect to redistricting?

A. Indeed, I did. I attended the public hearings in St. Petersburg, Tampa, and in Orlando at Valencia Community College, as well as testifying before the House Committee in the State Capitol.

Q. How many NAACP branches are there in the State of Florida, approximately?

A. Currently, there are a hundred and twelve units of the association in the state.

Q. Is it a fair statement that over the past year or two you have been in direct or indirect contact with each one of those branches concerning the redistricting process?

A. We have consistently for the past two years, beginning with our state convention here in Tallahassee, where we had representatives, I believe, of Cobb, Cole and Bell, the House attorneys, come to our state conference to present positions on redistricting relative to the census. We have had numerous workshops on the census as well as continuous workshops at all of our state board meetings relative to the issue.

We went to Macon, Georgia, last March, where we invited members of the joint redistricting subcommittee to join us [108] for a workshop. They did, including staff, who are in this courtroom. We have proceeded during the year to encourage and develop our project through the public hearing process. We have had numerous letters and memoranda to our branches as to what their activities should be, and we have presented obviously plans to this Court and to the Supreme Court of the State of Florida.

Q. Okay. Now, let me ask you about those plans. Did you personally, with the assistance of the NAACP's staff cartographers at the headquarters in Baltimore, draw the NAACP's congressional plan?

A. Yes, we did.

Q. Did you personally, with the assistance of the staff cartographers, draw the legislative plans that have been tendered and filed with the Court in this proceedings?

A. Yes, we did.

Q. Okay. In this redistricting process, what has been the overall goal sought to be achieved by the NAACP?

A. Our goal has been one that probably we can say began way back on the St. Augustine Beach a number of years ago that led ultimately to the passage of the Voting Rights Act; and that is, to increase the number of actual representatives in the Florida legislature and create congressional districts where we could run, as well as to create as much influence for blacks in the State of Florida in the legislative [109] process as we could.

Q. All right, Mr. Russell. I just want to turn now quickly, because we are pressed for time, right to the heart of the issue that we are addressing here today about the Senate, and that is Dade County.

To what extent, if any, has your work and your attention on the redistricting process been focused on Dade County?

A. We have indeed looked at Dade County in numerous versions. We have had presentations from local task forces in Dade County. We have had presentations from local task forces in Dade County. We have had conversations with many legislators from Dade County. We've spent a great deal of time on Dade County.

Q. Do you know how many blacks live in Dade County?

A. Approximately 393,000.

Q. Now, were you in court yesterday when the Department of Justice and the De Grandy plaintiffs presented

their proposal for the creation of four Hispanic majority VAP districts in Dade County?

A. Yes, I was.

Q. What effect, if any, would the creation of such a plan have on black electors in Dade County?

MR. RUMBERGER: Judge, that directly is an elicitation of an expert opinion. We don't have any affidavit or information about this to cross-examine logically on. We would object.

[110] JUDGE VINSON: It certainly may go to the weight, and I may have to give you some leeway in cross-examining, but I'm going to let him testify. I think it is appropriate to do that. Objection is overruled.

THE WITNESS: If four Hispanic districts are drawn in Dade County, it will prevent the drawing of two black districts in Dade County, which for the most part, very most part, can be drawn wholly within Dade County, two majority VAP black districts.

BY MR. BURR:

Q. And would that have a ripple effect on up to Broward County?

A. It certainly would, because there is a black Senate district in Broward and Palm Beach County that, if the plan espoused yesterday is adopted, would force in order to maintain that seat to go on up into Indian River, and then across the state to Fort Myers, as it's been drawn in the Hargrett, Brown and Reaves, and it still is not a majority black VAP seat.

MR. BURR: Your Honor, if I may approach the witness and pass him a document that I would like for him to identify?

JUDGE VINSON: You may.

BY MR. BURR:

Q. Mr. Russell, can you identify that document?

[111] A. This document happens to be a copy of a plan for the Senate which was adopted by the Florida

House of Representatives, but which was never brought up in the Florida Senate. It was developed actually by Representatives Burke and Wallace.

Q. All right. What is your understanding of the ultimate fate of that bill?

A. Ultimately, it just died and was never enacted into law.

Q. Okay. But it is a matter—a part of the public record, public domain; it was introduced and passed by the House, correct?

A. Certainly.

Q. All right. Now, what does that bill, this plan, for which I'm going to refer as the Burke, Wallace plan, what does it provide with respect to black VAP voting age majority districts in the Dade County area? I'm not talking specifically now only in Dade County, but Dade and surrounding counties.

A. This plan creates three majority VAP black Senatorial districts. The first one is District 35, which is in Broward and Palm Beach and has a black VAP of 51—

MR. RUMBERGER: Judge, I'm going to object. We are objecting to any testimony about Broward and Palm Beach, particularly Palm Beach County. That is not subject to the Section 2 attack by anyone, to my knowledge. [112] JUDGE VINSON: Sustained. I realize you may have to spill over into some adjoining counties, but we really are only concerned with Dade County now.

MR. ZACK: Well, Your Honor, the De Grandy has repercussions, and the Hargrett, Reaves, all the way, half the state of Florida.

JUDGE VINSON: We realize that any time you start pulling the string, everything else has to give or take, too. Go ahead.

MR. BURR: Well, Your Honor, just to reiterate what Mr. Zack just said, the very districts that Your Honor is being asked to adopt in the Hargrett, Brown, Reaves plan are not limited to Dade County. There is a spillover effect up a county or two, at least, up the East Coast

corridor as a direct consequence of what is happening in Dade.

JUDGE VINSON: I heard him say there are three voting age population black districts established in all of these. I want to focus on Dade County; and, to the effect that some of them overlap into other counties, necessarily, we will talk about that.

MR. RUMBERGER: There is one other matter that we might take up. This plan has not been submitted to this Court, to my knowledge. This plan has not been provided to us. This is the first time we've talked about this plan, and I have been here for months and months and months in [113] both congressional and these hearings. So we are talking about, for example, giving Mr. Zack the opportunity to have an affidavit from Mr.—from whatever—Dr. Lichtman. We don't have an opportunity. We don't have the plan. We don't have an affidavit. We don't have a report. We have nothing.

MR. BURR: With respect—

JUDGE VINSON: Maybe you better proffer where we are going to go with this witness.

MR. BURR: Okay.

MR. ZACK: Your Honor, may I just make a point for the Court and the record? This was submitted to the Justice Department. There was full knowledge of this.

JUDGE VINSON: Well, the Justice Department, they are now a party. I don't think that really qualifies as being disclosed.

MR. ZACK: I just wanted the Court to be aware.

MR. BURR: Your Honor, in terms of surprise about today's proceedings, Mr. Rumberger and the Justice Department, and everyone else in the courtroom, was given copies of this plan this morning. I mean, it's not that you don't have a copy in front of you to look at; I gave it to you.

MR. RUMBERGER: That's right. As I sat here at 8:30, we got a copy of it. That's not—in fact, just 15

[114] minutes ago was when we finally learned what it was.

MR. BURR: Your Honor, there is a dual purpose for introducing this document.

JUDGE VINSON: Mr. Burr, can we get a number identified on this exhibit?

MR. BURR: Yes. If we could get that marked as NAACP Exhibit Number 1, please.

JUDGE VINSON: Now, before we proceed, Mr. Burr, you need to tell everyone exactly what this witness is going to be testifying about, so that we all know at least where you are headed.

MR. ZACK: Your Honor, may I make a point for the record, sir? At the beginning of the trial, the NAACP specifically said that they had been made representations that the creation of these additional seats would not impact negatively upon blacks, and they said they wanted to carefully review that evidence; and, if they find to the contrary, they wish to present evidence to that effect. And I understand that that's what is occurring here.

MR. BURR: That is precisely what is occurring. We had an open mind about this until the middle of the day yesterday. We listened very carefully to the Justice Department's case, and were attempting to hear them when they said that the plan that is being offered on behalf of the additional Hispanic seats did not negatively impact on [115] blacks.

We conferred with our clients last night. We went back and reviewed these plans. We discussed it with the members of the legislature. And we came to the conclusion at about ten o'clock last night that we vehemently disagree with that representation that has been made to the Court.

Now, there are two reasons for getting into that. First of all, we suggest that this document is relevant in explanation of why Your Honor should not do what you are being asked to do on behalf of the Hispanics in Dade; but, additionally, when you hear this testimony, I hope that you will go the one step further and do what, in

fact, affirmatively is required to be done under Section 2 of the Voting Rights Act; and, that is, create this third black 50 percent or greater VAP district. Both objectives cannot be accomplished in Dade County. They are mutually exclusive. That is a difficult position, I understand, to put this Court in. You have two protected minorities under Section 2, both with legitimate claims.

JUDGE VINSON: I sense that you are interjecting something that really hasn't been pled, Mr. Burr.

MR. BURR: Your Honor, we have a pending lawsuit that has been consolidated with the action that is ongoing here alleging a Section 2 case.

Now, it is true that we do not make specific [116] allegations with respect to Dade County, Broward County, or for that matter as to Escambia County, which later this afternoon we are going to get on board and help the Justice Department carry their water on.

JUDGE VINSON: You are asking us to look at the creation of three black districts with the majority voting age population in this area which hasn't been pled. You haven't pled it.

MR. BURR: Not specifically, no. We can amend the Complaint to plead that specifically, if that's what is required. We didn't know we were going to start a Section 2 case until 8:30 yesterday morning.

JUDGE VINSON: Let's hear from Mr. Cardenas. He's been standing patiently.

MR. CARDENAS: Thank you, Your Honor. Basically, I don't understand counsel's objections as of ten o'clock last night, because our case so far has been to promote two plans in Dade County, either the De Grandy alternative or, more than likely, the Reaves, Brown alternative. Both of those alternatives, which are the ones that the experts and our witnesses have testified to, have been in the possession of counsel since the inception of this process and were in the legislature even before then.

To have reached the conclusion at ten o'clock last night that the Reaves, Brown plan and that the De Grandy

[117] plan were not acceptable, and that they had an open mind is totally incomprehensible to me.

Furthermore, Your Honor, they have presented their own plan, and we have been coplaintiffs based on their plan from the very offset. How they are coming to us and telling us that we have second thoughts as to our own plan, and presenting a new, revised plan on matters as to which have not been pled and have presented them to counsel at 8:30 this morning.

Now, there has got to be somewhere, some way, a way to make a determination that that just doesn't cut it.

MR. BURR: We submitted our own plan in the Section 5 proceedings that were ongoing until yesterday morning. We submitted our own plan before the Supreme Court. Sometime during mid day yesterday this became a Section 2 case.

Now, obviously, the Hispanic plaintiffs would like to have this Court's consideration of the alternatives here limited to its two conveniently chosen alternatives. We are here proposing to Your Honor that there are more than just those two alternatives. There is one that they don't want you to hear about because they don't like the conclusion that it's going to lead you to.

JUDGE VINSON: Everybody is claiming that they are ambushed, including I think the three of us up here. Let's see what Mr. Zack has to say.

[118] MR. ZACK: If I can put this in focus, I can explain why no one is ambushed and I can try and explain where we are in this process. I want to go back—take you back to all of yesterday—it seems a long time ago—which is my statement from "Alice and Wonderland," verdict first, sentence afterwards.

This is the remedy phase of the proceedings. What Mr. Cardenas is trying to do improperly, as he admitted to this Court, is "We're trying to promote two plans." We are in the process at this point of finding whether or not the State of Florida's Supreme Court plan is in violation of Section 2. We strongly submit that we will prove

that it is not the case, and we are entitled to a directed verdict, and we know the Court has said we will have that opportunity, and we will be given it shortly.

If, in fact, we prove there is no Section 2 violation, which we will prove—or they have failed to prove their case is a better way of saying it—then this case is over. If, in fact, after we put on our case, and this Court finds a Section 2 violation, which we believe will never occur, because we don't believe we will reach our case, but at that point it then goes back to the legislature, all right?

Now, these other plans have been put into the pot, and we have been talking about De Grandy and HRB and all [119] that, because they are there to show you what could or could not be done by the legislature if it chose to do that at some point in time.

JUDGE VINSON: That's the first element of the *Gingles* factor.

MR. ZACK: That is absolutely correct.

JUDGE VINSON: Sufficiently large and geographically compact, and the only way you can do that is say this is something we can draw.

MR. ZACK: For that limited purpose, the NAACP's plan is relevant to these proceedings. If, in fact, you find that, as far as the Senate is concerned, they have not met their burden, the case is over. But this is the basis upon which it is being brought to the Court's attention. I believe and I hope that puts in focus exactly where we are.

JUDGE VINSON: All right. Let's see what Mr. Peters has to say.

MR. PETERS: The House concurs with Mr. Zack that the De Grandy Republican set the trap and have been snared. We have been contending all along that they were not in complaints, they were not the answers, they were not matters at issue. It has prejudiced us severely. It is only fair now for them to pay the price.

This is relevant to show the flaw in the analysis [120] of the Department of Justice in protecting the black and

Hispanic rights in Dade County. It is relevant to show the fatal flaw.

MR. ZACK: One last matter. At midnight last night —I forgot to bring this up earlier. At midnight last night we received the Fourth Amended Complaint from De Grandy, and at some point in time the Court has to rule on that issue. We need to know which Complaint we are going to answer on Monday. But I want the Court to know that the last people in the world that should complain about this is the gentleman standing at the microphone.

JUDGE VINSON: What is fair for one side is fair to the other. Let's see what Mr. Rumberger has to say, and then we are going to take a huddle for just a minute.

MR. RUMBERGER: In terms of the snare, Your Honor, Mr. Peters talked about, I've chewed off three legs, and I'm still in the trap. But, in any event, this plan was not offered at the time the scheduling orders required it. The first time we heard about this plan was this morning. Based upon that and based upon the fact that you have given others the opportunity to examine affidavits or review something, we feel that we are being prejudiced.

Currently, there are two plans being considered in addition to what we call the Senate plan—one is De Grandy and one is Reaves, Brown and Hargrett—and that is it. To [121] allow them to come forward now with another plan on this one would simply be violative of our rights and procedures that the Court has previously established. Thank you.

JUDGE VINSON: We have a few other comments, I think. Mr. Abrams?

MR. ABRAMS: If I may, Your Honor—

MR. GREGORY: Once again, Your Honor, on behalf of Reaves, Brown and Hargrett, Ron Gregory. To reaffirm the same, Your Honor, we went to great pains yesterday to identify, and I was allowed to at least to articulate which areas we were going to be joining or

intervening on. The NAACP did not stand up to speak to that point, and it relates to that plan. All of these plans have already been in circulation, thoroughly discussed, thoroughly briefed, and the rest. If there was any surprise, the surprise was the timing of when we were going to get into a Section 2 plan. However, from the summarial point of view, once the decision was made, it then became a matter of presenting the Section 2 complaints and the Section 2 charges and allegations. Dr. Lichtman testified, as the Court noted, testified as a summarial witness. Now you are looking at the possibility of reopening his testimony so that he, in turn, if the Court were to grant this to come in, so he in turn can review this plan with God only knows how many other plans that may come up.

[122] This was a plan that did not come out, was never discussed, it was never disclosed throughout all of the various proceedings where upon we were considering the various state plans for Section 5, Section 2, or whatever, and what is in corroboration with and consistent with their plans, this plan never appeared; it never came up. This is not an ambush. This is an attempt to side-saddle with the NAACP, the House and Senate Democrats trying to push this plan to protect themselves from Section 2 complaints, and we think that should not be allowed.

Reaves, Brown and Hargrett plan, it does have the three black seats in question. If there is an argument as it relates to the three black districts, it has been made; it has been proffered; it has been discussed; it is before you, and we should not now allow this plan to come forward.

MR. ABRAMS: Your Honor, Willie Abrams for the NAACP. We sat here all day yesterday, and we were not here to simply look around the courtroom. We were here to monitor what was going on in Dade County. We started off this proceeding by telling the Court that we are watching what was going to happen in Dade County. The Justice Department, counsel for Reaves, Hargrett and Brown—

JUDGE HATCHETT: Are you counsel with Mr. Burr?

MR. ABRAMS: That's right, with Mr. Burr.

JUDGE HATCHETT: He stated your position. The [123] Court will be in recess for 15 minutes.

(A recess was taken from 11:35 a.m. to 11:40 a.m.)

JUDGE HATCHETT: Please be seated.

JUDGE VINSON: Everyone is back. Mr. Burr, with regard to what you have proposed to do, it is our decision that certainly the regression issue has been injected all the way through. Dr. Moreno, not only did he testify about it, but he was cross-examined on it. Dr. Lichtman was as well. And that certainly is a legitimate issue. But to affirmatively propose the three districts as you have, I think catches everyone by surprise, and that's unfair in our judgment.

So we are going to limit your presentation of evidence solely to the issue of the regression effect upon the establishment of the fourth super-majority or majority Hispanic districts with regard to the regression that might have on the black districts. Is that understood?

MR. BURR: Well, Your Honor, at what point in time will the NAACP be able to lay out for you the three basic threshold elements to a *Gingles* Section 2 case? We have already done two of them.

JUDGE VINSON: If we find that there is, in fact, a Section 2 violation, then this becomes a remedy, among any number of remedies available, upon which the Court can act. I think at that time it would be appropriate for us to [124] consider.

MR. BURR: All right. With respect to the first two prongs of the *Gingles* test, I believe, respectfully, that those were made out through the cross-examination that I did of Dr. Lichtman.

MR. ZACK: We very much object to that, obviously, if that's argument. I don't know what counsel is trying to do.

MR. BURR: In order to establish a third prong, I have to show the Court, through a witness, why it is possible to draw the three black majority VAP districts that I would like to tender evidence. Without the opportunity to tender that evidence, I don't know how Your Honors could make a ruling about whether I have established a prima facie case or not.

MR. ZACK: We are prepared to—

JUDGE VINSON: Wait just a minute.

(Pause.)

JUDGE HATCHETT: Mr. Burr, at what point did you attack the black districts in the Senate plan or the Supreme Court plan or the Florida plan, the plan we adopted yesterday? At what point did you attack these districts?

MR. BURR: Well, on April the 20th, I believe was the date, the NAACP filed its Section 2 case. There I believe was not even a passed Senate Joint Resolution 2G at [125] that point, so the allegations were admittedly general, not specific to particular counties or particular districts. We did not ever anticipate the possibility that we were going to have to flesh out the Section 2 claims and be prepared to come into court and present them to Your Honor today, but in—

JUDGE HATCHETT: That didn't even occur to you when the Justice Department filed a Section 2 claim, when the DeGrandy plaintiffs amended to include a Section 2 claim? It didn't occur to you that you needed to do anything?

MR. BURR: Well, Your Honor, the representations that were made to us consistently was what the Justice Department wished to do in Dade County was not going to negatively impact on the interest of black voters. I announced yesterday morning, we are going to sit here, we are going to listen, we're going to try and keep an open mind about it, but we beg to differ.

JUDGE HATCHETT: Unfortunately. our procedure didn't allow you to keep an open mind; because, if that's true, another party tomorrow will keep an open mind today, and file something tomorrow.

MR. ABRAMS: Your Honor—

JUDGE HATCHETT: Judge Vinson has stated the Court's ruling on this matter. Mr. Burr, would you please proceed in accordance with the Court's ruling?

[126] MR. BURR: We reserve the objection to that, please.

JUDGE HATCHETT: We understand.

MR. BURR: Okay.

JUDGE HATCHETT: And note, however, that Judge Vinson did indicate that in the event a Section 2 violation is found, and this Court is then to the point of giving a remedy, you will be heard on the proper remedy. But at this point, we think that you—unfortunately, our procedure passed you by.

MR. BURR: Okay. In order to establish the third *Gingles* prong, it is incumbent upon us to show to Your Honors what could have—

JUDGE HATCHETT: Mr. Burr, if you are going to ask your witness a question, do so.

MR. BURR: All right, sir.

BY MR. BURR:

Q. Mr. Russell, please just describe in whatever degree of detail you believe that you can consistent with the Court's ruling, why it is the plan, the Section 2 violation or remedy that is being proposed on behalf of the Justice Department in Dade County on behalf of the Hispanics disadvantages black voters?

MR. ZACK: Your Honor, we object to any Section 2 violation of the Senate plan. Our argument was, at the [127] point in time that the Court—exactly what the Court's position is, is our position exactly. How, what we are saying is that any testimony elicited at this time

about Section 2 violations on the Senate plan is impermissible based on the Court's previous ruling.

JUDGE VINSON: Overruled on that. I'm not sure you ought to categorize it as a Section 2 violation, but on the proposal made by the United States, I think he is entitled to address that. So characterize it that way, Mr. Burr.

BY MR. BURR:

Q. How does the proposal that has been advanced on behalf of the United States, in your opinion, disadvantage black voters in Dade County?

A. The proposal suggested by the Justice Department, if it is, in fact, accepted, will prevent the drawing of two majority VAP black districts within Dade County with one extension into Carver Ranches for a black majority VAP district. It will prevent those two districts from being drawn. And, if those two districts are prevented from being drawn, it severely disadvantages us in terms of black representatives in the Florida Senate.

MR. HEBERT: Your Honors, may I interpose an objection at this point? I haven't addressed this issue at all, and it's really—I want to make sure the Court understands the position of the United States clearly. We [128] are not, contrary to the testimony you just heard and contrary to a lot of assertions, we are not asking this Court to adopt a particular plan and impose it on the State of Florida. We have suggested to the Court that the De Grandy plan more fairly reflects Hispanic voting strength in Dade County, and we believe it is an alternative, and the Court could adopt it as an interim measure until the state comes up with a plan of its own; or that the Reaves, Brown plan, which I believe now the testimony we've rounded it out to show that that plan, in fact, even more so fairly reflects Hispanic voting strength, that that is yet another alternative available to the Court.

But I want to make one thing crystal clear, the United States Department of Justice does not propose redistrict-

ing plans and draw plans for the Court or for the State of Florida. It's their duty under the law.

JUDGE VINSON: Thank you, Mr. Hebert. I think that is understood. Perhaps we called it a little bit differently, but I think everybody understands that.

MR. BURR: Your Honor, that's fair enough, but in order for the government to go forward and demonstrate to Your Honors why there is a violation, they must refer to some plan.

JUDGE VINSON: We understand that.

MR. BURR: Now they've referred to two of them. [129] Both of the two accompilsh an Hispanic objective.

JUDGE VINSON: We understand that, Mr. Burr.

MR. ZACK: Your Honor, our objection is that the question goes to maximization in our view. This is a Section 2 proceeding. We are talking about whether there is an opportunity to elect candidates of choice under Section 2 of the Senate plan. That's where we are. We have to focus on that, and we will be given an opportunity to address that issue on directed verdict. So, on that basis I move to strike his previous testimony.

JUDGE VINSON: Objections I think are all overruled. We will proceed now, Mr. Burr, where we left off.

* * * *

[134] BY MR. ZACK:

Q Until—well, the NAACP plan and the Senate plan, as approved by the Supreme Court, now the Supreme Court plan, as approved by this Court as well, was the same as the NAACP plan for all intents and purposes; is that correct?

A Essentially.

Q Essentially the same. And under the Senate plan, there are two black seats; is that correct?

A. That's true.

Q And presently there is only one black senator with a seat with a VAP over 51 percent; is that correct?

A. That's correct.

Q So, there has been an increase in the number of black representation under that?

A Under the SJR?

Q Yes.

* * * *

Q And this Mr. Daryl Jones is a black gentleman?

A Yes.

Q And do you have an opinion as to whether he will win that Senate district number 40?

* * * *

Q I would like for you to do that.

A Well, based on our review of it, I would say that Daryl [136] Jones would be able to win district 40 in the Senate or the SJR as amended. And the reason I would say that is that Mr. Jones is currently in a district in the very same area in the House. That district has a 28 percent black voting age population. And Mr. Jones has won it very well, in running that district very well, had crossover vote. And it would be my opinion that he would do the same in the Senate district with a similar configuration. The Senate district is, I might point out, does have a little higher black VAP.

Q Even higher than the House?

A Yes.

Q And he has announced his candidancy?

A To my knowledge.

* * * *

[137] Q If Daryl Jones is elected, that would be one black Senator from Dade County?

A. That would.

Q And then htere is another black seat in Dade County with over 51 percent VAP?

A District 36.

Q That everybody agrees before.

A Yes.

Q Now, if those two black Senators—whoever their names are—are elected, there would be two black Senators out of six Dade County Senators; isn't that correct?

A If that happens.

Q Right. And that would be approximately thirty-three and a third percent; and the population, the black population of Dade County, is 19.27; isn't that correct?

MR. RUMBERGER: Specifically we would object on this quota kind of relation testimony. That is not relevant.

JUDGE VINSON: Overruled.

BY MR. ZACK:

Q Isn't that correct, sir?

A It would be 33 percent of the Senate seats in Dade County.

* * * *

[139] Fair enough. Now, sir, let me make sure there is anything else. As far as—by the way, there is no incumbent in Senate No. 40; is there, the new Senate No. 40 that Daryl Jones will be running for?

A No, sir, not that I know of, not that I'm aware of.

Q And as far as balancing the concerns of the Hispanic community and the black community and the Anglo community in Dade County, the Supreme Court plan is a fair plan, sir?

* * * *

[140] Q And you would like to see the black community—if Hargrett, Reaves and Brown is approved, you would not have Senate 40 where Daryl Jones would be running from; isn't that correct?

A That's correct.

* * * *

TESTIMONY OF RONALD WEBER

TR VOL. V

* * * *

[7] MR. ZACK: We also understand, the court, just as far as travel arrangements, if we go out before 11:59, the court will enter its order I presume either finding or rejecting the claim, Section 2 claim, in a written form and then request remedies. I presume would be—I would ask the court to consider what they intend to do at a break.

And then the other thing is I talked with Mr. Guthrie last night, because I started thinking about Mr. Guthrie, as knowledgeable as he is about how to do the remedy stage, what would be needed for anybody who would submit remedies within the time constraints of the court. And in order for a remedy to be at all submitted that would be of any use to court, the court needs to advise the geographic limitation of that remedy and what the court wishes to accomplish by that remedy, so

[12] THE WITNESS Okay. We both got in Friday and Ms. Butler and I got together. And I think the main question that you asked me at that time was—was it—is it really possible to create a four Hispanic district plan that will work in Dade County, in South Florida, and at the same time not adversely impact upon the opportunity for African-Americans to—to elect candidates of choice again in Dade County, South area.

Q Do you remember whether I asked you to consider citizenship?

A That was an aspect of that that you asked me to do, yes.

Q How did you attempt to deal with the question of citizenship, race, specifically or also exclusively for the Hispanic population in Dade?

[13] A Well, I have always been aware from the first time I got involved in this case and even before that that one of the concerns when you deal with a Hispanic popu-

lation in a voting rights case, there is the question of really how many of those persons of voting age are in fact eligible, registered to vote and participate. And in the *Garza* case, for example, in California, that was a big issue, and I was familiar with that case.

And so in this case I was aware that citizenship might be of concern. And I have thought a lot about how one would go about trying to—to disentangle citizens from noncitizens. And the best information that I am aware of that allows us to do that is available from the U. S. Bureau of the Census. And just recently within the past two months or so the Census Bureau has released what's call a summary Tape File 3 files. And on those files are some of the sample data that they took, I think it's a five percent sample, that deals with the question of citizenship, what number of persons are citizens, what number of persons are noncitizens. Okay. So I knew there was data in that file as well as some data on country of origin for Hispanics.

* * * *

[15] A You really need two essential ingredients. One, you need to have the census data for Dade County which I described earlier, Summary Tape File 3, data on citizens, noncitizen vxariables, I would call it. And second, you need to have some information about the Hispanic population and particularly the country of origin of the Hispanic population. That was going to become very important in my analysis.

Second thing you just need then is you need information about voting age populations on the respective plans that have been offered, the three plans for Dade County, the Florida plan, the—it's the Hargrett, Reaves, Brown plan, and the De Grandy plan, information on the voting age populations in the respective proposed districts, because you are going to take this census data after you have done your analysis and you are going to apply it to just basically take [16] the VAP for the Hispanics and break it into two components, a component that is citizen

and a component that is noncitizen and then answer the question can or are, in those districts that are being—have been adopted in this plan, or proposed in that—those plans, are those districts containing a majority of citizens who are Hispanic within the voting age population. That's the question we want to answer. Very simple question.

Q Did you at some point determine the citizenship for the various groups in Dade County?

A Yes. We undertook an analysis to do this.

* * * *

[18] Q Professor, will you explain for us what Defendant's Exhibit 11 is?

A Yes. It's an exhibit that contains material describing the results of my analysis, with some illustrations to particular districts, in particular the plans, as well as some handwritten, because we simply ran out of typing resources, some handwritten tables that show for each of the Hispanic majority VAP districts in each of the plans, what we would have once we have discounted it, the citizenship, the noncitizens out of the process. Okay. That's what's in that exhibit.

* * * *

[19] to believe there is no citizen, noncitizen data available at the bloc level. Those data are suppressed in the STF 3 tape to project the privacy of the citizens, the persons who responded to the census. So the bloc group —that I—

* * * *

[20] can help me to get through it.

Okay. Start the process by saying, okay, the first thing I asked the staff at the Senate to do, actually we had some help from other resources in the state to do this. I need to give credit to everyone. First thing I asked them to do was to create a data set that would merge data at the track level and at the bloc group level for the basic components. We need it to put into the process. The

percent of VA—the VAP in the district, the voting age population in the district, put that in, that's available in many, many, excuse me, available in many, many places.

Okay. But what we got from this STF 3 tape was the number of citizens and the number of noncitizens at the tract level and the bloc group level. So that's one piece of information. Number of citizens, number of noncitizens so we could create a proportion. Okay.

Q Let me stop you to make sure we clear this up. Is this information broken down by country of origin? I mean, could you tell, for example, a census bloc, how many Cubans are counted in that census bloc group are not citizens?

A No. No. No. We are going to have to use an estimation procedure to do this. All we know in the census bloc group is how many are citizens and how many are noncitizens, but we do not know whether those noncitizens are Cuban, nonCuban, what they are. Okay. If we had that answer we wouldn't even have [21] to do this kind of estimation procedure, we would just go directly to the census and pull those numbers out, create a real simple exhibit and be done with it. Okay. It's just not there, the census didn't ask that.

* * * *

[26] JUDGE STAFFORD: Listen, I will let my colleagues deal the who struck John part of this thing, but I want to—I want to ask you, ma'am, does Section 2 concern itself with the breakdown into subgroups of the language or racial minorities?

MS. BUTLER: Judge, it does that in two respects. The aspect in which we are dealing with at this moment is we are trying to calculate where indeed there are Hispanic majorities in the districts that have been proposed. And because they are, and as we will determine shortly in Dr. Weber's testimony, differential race of citizenship, then the different components of these groups become important. For example, we know that Cubans have a much higher citizenship rate than the other groups.

So if we don't take into account the differential citizenship rates of the group, we have no clue as to where these districts have been created or are indeed majority Hispanic. For example, if you were creating a district made up of Hispanics who turned out to be, say, Nicaraguan, it may very well be a fact that only five percent of those people are actually citizens.

And so the differential rate comes in there. We've got to disaggregate Hispanics into the various subgroups for the purpose of calculating the percentage of the citizen voting age population in the district. That's point one.

The second point is there is no basis for combining [27] them unless they have been shown to be cohesive. And until there has been some proof that these groups actually consider themselves a single group for political purposes, then we've combined them without any basis for it, much the way we might combine American Indians and blacks, because they happen to both be minority groups. So that's the second point.

But at this point we are only talking about the first, how we are going to calculate whether these folks are the majority of the voters of the districts that have been created for them.

* * * *

[28] JUDGE STAFFORD: I guess I get concerned, Ms. Butler.

MS. BUTLER: I understand.

JUDGE STAFFORD: Here, what I think is going to be the last day of testimony we are throwing a new wrinkle into this case.

MS. BUTLER: May I respond?

JUDGE STAFFORD: Yes.

MS. BUTLER: Because I think I can take of care concern. We only really intend to deal with the first of these issues, which is that of citizenship. At that point we are going to offer some testimony about the Hispanic groups, but we are only really going—the main point

of this testimony is to look at citizenship. And in order to look at it accurately, there has to be some disaggregation of those groups. We are not going to be coming in here and be talking about whether—where these groups have come from and where we should aggregate these folks and those folks. That's not what we are going to do. We are simply going to try to give the court an accurate picture of whether the districts that are created are majority Hispanic.

JUDGE STAFFORD: Well, it is the Florida Senates' position that the decisions here were made on something other than voting age population?

MS. BUTLER: I'm sorry. Whose decision, Your Honor?

JUDGE STAFFORD: I mean the decisions which you are [29] seeking to defend.

MR. ZACK: Let me respond to that.

JUDGE STAFFORD: Now, she's representing the Senate on this, she can handle it.

MR. BURR: Yes. Yes, I can certainly handle it.

JUDGE STAFFORD: Each side is entitled to one apostle. Go ahead.

MS. BUTLER: Your Honor, the districts that were created were created through the political process, in terms of the district that I am here to defend. It is not the obligation of the Senate to create districts that are majority Hispanic in terms of citizenship population. The Senate certainly understook to take into account the citizenship in creating supermajority districts. That's been the testimony of everybody that testified, that supermajorities are necessary for taking into account citizenship. The Senate certainly did that in the three majority Hispanic districts that it created. It took citizenship into account and the only way it could at that point which was to up the majorities and make them supermajorities.

JUDGE STAFFORD: Well, I have expressed to you my concern and I will let you handle it from there. Okay.

JUDGE VINSON: Let me just say two things. First of all, regression analysis is not simple, Ms. Butler, In

my humble opinion, it's not simple. And you may have a [30] calculator that has a function that will allow you to do that, that's only part of the problem. To analyze these figures really is going to require some time. And I think these people are disadvantaged in not being able to do that here in the courtroom here at this time.

Second thing is that citizenship is a moving target. You may have a snapshot at 1990, but just for the same reason that we don't use registered voters, we use voting age population, out of that population conceivably every one of them could register to vote, but they may not. Conceivably all of these noncitizens can become citizens in a relatively short period of time. And I point out, too, that the data is suspect in the sense that citizenship in 1990 is in a state of transition because of the way citizenship is being handled. And some of this—some of this may not be the true picture in 1992. So these are all vaceats that—

MS. BUTLER: Your Honor.

JUDGE VINSON: —you should be a ware of.

MS. BUTLER: Let me suggest, when we finish looking at the numbers, that these caveats might not make a great deal of difference.

Of course, the same thing could be said about voting age population. The population gets older every day. And there is a differential rate of people turning from 17 to 18 and deople dying. The population is generally getting older. [31] So anything that can be said about the increase in time for citizens can also be said about voting age, and yet those kind of adjustments are not made. The Supreme Court's mandate is to see that you've got majority of the voters. The language of *Thornburg* is not voting age, it's voters. And if you have to discount the population for people under the age of 18, then it's very difficult to imagine not having to discount for noncitizens. You can take—an example you could create conceivably an entire district in which there was no one who is a citizen.

So you obviously have to take into account in order to create a district that makes any sense for the very people for whom the benefit is supposed to be created. And creating a district supposedly to be helping Hispanic, and turns out it doesn't have any Hispanics in it, you certainly haven't accomplished your objective.

* * * *

[34] (Discussion off the record)

MR. HEBERT: If I may? Counsel has left her notes here.

(Pause)

Your Honors, the Supreme Court in *Thornburg versus Gingles* said that as to the first prong, that the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. That was the first prong of *Gingles*.

Now, when *Gingles* was first decided by the Supreme Court, everyone thought in 1986 that that probably meant you had to show a majority of the total population, not voting age population. So there were a couple of early cases right in the aftermath of *Gingles* that went to the courts of appeals including one out of Illinois in Springfield where the Seventh Circuit said that it was voting age population that you needed to show a majority of.

And cases that have been heard in federal courts since that time have really used the voting age population statistic as the statistic in the case. And for the very reason that Judge Vinson said, because it is a moving target, there are some people who even if they are citizens don't register. So you don't get into things like voter registration rates, you don't get into voter turnout rates, [35] you don't look at what percent crossover and try to take that into account and demonstrate as a prerequisite to your case that the minority district, Hispanic or black, is going to be able to elect a candidate of your choice. All that is required is that you focus in on voting age population.

So for counsel to advise this court that it's voters that you need to focus on, the reason that you—no court has ever held that. The Supreme Court hasn't addressed the issue except in *Gingles*. And the reason you can't focus on voters is that some courts have said because oftentimes voter registration rates which usually show minority citizens at a depressed level voter registration rates, are themselves often a product of past discrimination. So it would be unfair to use that as the base line.

So I think that voting age population—counsel, Mr. Zack, makes the point that this is the whole focal point that the court is focused on. I think he's confusing compactness which indeed is a very important issue in the court's mind with citizen VAP.

And this issue, as I said before, is well-known to the state. They had these documents available yesterday morning, I don't think it's a defense for them to get before this court and say, well, we thought we were going to put no our case yesterday, so that's why we gave the government their exhibits today. I mean, if they prepared to put their [36] case on yesterday, they could have given us these and I could have at least had an opportunity to do some of the math.

And the reason that I say that, and I have only had a couple of minutes, and yes, I do know how the regression analysis works in a very general way. I'm not a statistician. But for example, I have already done, sitting at the table, a calculation using the method that Dr. Weber apparently uses here.

MS. BUTLER: Your Honor, he is beginning to testify now.

MR. HEBERT: I'm not under oath and this is not evidence. I'm simply trying to make a point here.

JUDGE HATCHETT: Yes. But the issue is notice at this point.

MR. HEBERT: Right. It's notice. And the fact is that even in doing my own calculations, some of the districts that the state has drawn that are majority VAP Hispanic fall below 50 percent.

JUDGE HATCHETT: You're testifying at this point, Mr. Hebert.

MR. HEBERT: All right. I just wanted to show I think you can use these numbers for a lot of different purposes.

MR. PETERS: Briefly as usual, Judge. The court recognizes the fact that the issue here is the first *Gingles* [37] prong, and if they can't prove it. they lose. The second issue is I assume the theory of their case is they have presented more real districts that is district that can elect minority candidate of choice than have the House and Senate. The thing in each of their cases have been a comparison, theirs were more, their's were better. If in fact for the premise of the House case and Senate case that these districts are not real, then there has been no discrimination because what they have produced are illusory Republican gerrymanders which really will disserve the citizens they claim to represent.

Respectfully, Judge, this is relevant to the first *Gingles* prong. It has to be considered by this court to determine if they proved their case. Has to be.

JUDGE HATCHETT: Thank you. The court will leave the bench to confer.

MS. BUTLER: Judge, may I just say a couple more things?

JUDGE HATCHETT: Yes:

MS. BUTLER: I would like to make sure that we've got several distinctions in mind.

First of all, Mr. Hebert refers to voters and then equates that with registered voters. No one is here arguing that this court should consider registered voters in deciding whether a majority has been created.

[38] He also says that *Thornburg* makes reference to majority without making any particular specification. As a matter of fact, when the court explains the reason for this requirement, it uses the word "voters." And this is what it says. It says:

> "The reason the minority group making such a challenge must show a threshold matter that is sufficiently large and geographically compact to constitute a majority of the single member district is this: Unless the minority's voters—voters, voters—possesses the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by it."

So the court's explanation of why it uses the term "majority" clearly refers to voters, and by that it's reasonable to assume potential voters so that we don't get into the question of registration. Obviously registration may change. You change the election structure, when people who previously haven't registered may not register, but that certainly can't be applied to noncitizens.

JUDGE HATCHETT: Thank you, Ms. Butler.

MS. BUTLER: Oh, one other thing. There is a case directly on point. *Romero versus the City Pomona.*

(Discussion off the record)

JUDGE STAFFORD: Familiar with that case.

* * * *

[40] JUDGE HATCHETT: Let's finish this all first. The Court rules that the Senate has provided insufficient notice of this witness' testimony. We will allow Ms. Butler to state into the record what she proposed by this witness and what he would have been expected to testify to.

Before going on, let me announce one other ruling: This Court rules as a matter of law that the relevant inquiry in this case is voting age population.

Ms. Butler, you may make a proffer into the record, if you care to.

MR. PETERS: Judge, is that without regard to citizenship?

JUDGE HATCHETT: We rule as a matter of law that the relevant inquiry in this case is voting age population.

* * * *

[41] MS. BUTLER: Your Honors, do you want me to make my proffer of proof—

JUDGE HATCHETT: If you care to.

MS. BUTLER: I certainly do, Your Honor.—in a [42] particular form rather than through the question and answer this witness that would make a better record?

JUDGE HATCHETT: You may state it into the record without the witness testifying.

MS. BUTLER: Okay. What I expect this witness to establish is that in plan 180 proposed ir. this case, the Senate district 33—plan 180 being Hargrett, Reaves and Brown—district 33 contains a citizen Hispanic voting age population of 39.4 percent; that district 34 contains a citizen voting age population of 45.1 percent; district 35 contains a citizen—Hispanic citizen voting age population of 37.2 percent and that district 40 contains a citizen voting age population of 38.2 percent.

JUDGE VINSON: You said 37.2. You mean 37.5?

MS. BUTLER: Yes, Your Honor; 37.5. Sorry.

That plan 275, which is also known as the De Grandy plan, their Senate district 33 contains an Hispanic citizen voting age population of 46.5; district 34 contains a citizen Hispanic voting age population of 43.1; that district 35 contains a citizen voting age population of 32.8 and district 40 of 49.0.

JUDGE STAFFORD: Again, that last number?

MS. BUTLER: 49.0.

JUDGE STAFFORD: Thank you.

MS. BUTLER: That the State's plan, the three [43] districts in the State's plan, Senate district 34 contains a Hispanic citizen voting age population of 42.8; district 37, a 49.1 and 39, district 39, of 47.6.

I also expect him to testify that given these numbers, the fourth Hispanic district in the two alternative plans is

certainly not a district in which Hispanics can expect to elect a candidate of their choice; that the three districts in the Senate's plan are indeed such districts in part because they contain Hispanic incumbents and have a record of having elected Hispanic candidates with those particular percentages.

May I ask Dr. Weber if this would indeed have been his testimony to complete my offer? I am making an offer of proof here, Your Honor. I want the record to reflect that this is what my witness would have said.

JUDGE HATCHETT: Well, I don't know what we'll do if he says no.

MS. BUTLER: If he says no, we can—

JUDGE HATCHETT: If you want to run that risk, yes, you may ask him that.

BY MS. BUTLER:

Q Professor Weber, would this have been your testimony?

A Not all.

Q What?

A Not all my testimony.

Q Not all of it. Well, you would have so testified, I [44] assume?

A No, meaning on this issue, no.

* * * *

[46] JUDGE HATCHETT: I want you to understand that our relevancy—you should understand that notice was insufficient, but we thought we would give you a clue,-to save you some other time, to tell you that we believe the relevant inquiry is voting age population, because to simply tell you that the notice was insufficient and leave you with that we thought would cause more problems later on. So, yes, the primary ruling is insufficient notice.

* * * *

[47] JUDGE HATCHETT: Yes, it means that citizenship is not important.

* * * *

TESTIMONY OF RONALD WEBER

TR VOL. VI

* * * *

[49] MR. HEBERT: May I have a moment to address the Court on the ruling that you made just before the break?

JUDGE HATCHETT: Yes. We are not going to reargue it.

MR. HEBERT: And I—pardon me?

JUDGE HATCHETT: We are not going to reargue it.

MR. HEBERT: Okay. Correct. And I am not going to get into the argument about what the benchmark ought to be. My concern is with this case and the Supreme Court's review of this case. Now, there is an appeal currently pending in the Supreme Court and our response is due by noon today. So, I have been in touch with the Solicitor General's Office on our position before the Supreme Court.

My concern, however, is that there will be an effort [50] made by the defendants in this case to supplement the record before the Supreme Court with this morning's ruling. And the thrust of their position will be that as a matter of law this Court has ruled that citizen VAP is never a relevant inquiry or whatever instead of as I understand the Court's ruling to be based on the fact that primarily there was insufficient notice given to the people who brought this case.

And I would really like the record to be clear on this, that it's at least an equal amount of both or that it's the notice issue that drove this thing from the get-go. And I'm very—I'm concerned about that.

JUDGE HATCHETT: Let me say it again: The Senate has provided insufficient notice of this witness' testimony. The Court thought it would aid the Senate in going further to give them some direction of how we felt about some other things that we thought would come up in the case.

The Court's direct ruling is the Senate has provided insufficient notice of the expert witness' testimony. That is the ruling of the Court. Anything past that was intended as a gratuity to move the case along.

MR. HEBERT: And I would also want to stand corrected on one point. I went back and read the Pomona case and I think there is some—there is some legitimacy to the State side, that citizenship is sometimes taken into account as a measure, but that's a Ninth Circuit case and we can argue that all day.

[51] JUDGE HATCHETT: We're not going to..

MR. HEBERT: And I know you don't want to. So, I just wanted you to be aware.

JUDGE HATCHETT: We're not going to. However, I don't want to mislead anyone, either: That when it's time to rule on whatever is presented, this Court will rule voting age populations. But as to this witness' testimony, there is insufficient notice.

* * * *

[48] Q Does the plan provide—does the Florida plan provide proportional representation for both African-Americans and Hispanics in Dade County?

A Yes.

Q Doctor, in your experience as a political scientist, are most calculations of proportional representation based on the relationship between votes cast and seats received?

A Yes, they are. I think I need to explain a little bit. A lot of work has been done on that, yes.

Q Do you know roughly what the proportion of the citizen voting age population in Dade County is Hispanic? Would you take a look at what has been marked for identification as Defendants' Exhibit 14?

A Yes. It's 31.2 percent.

Q And if we were to assume that the citizen voting age population is the only population that would translate into votes?

A Yes.

Q Then are Hispanics overly represented in the Florida plan?

A If you use that as a criteria to access proportionality, the relationship between seats and votes, you would suggest that there are two seats for Hispanics.

I can't answer for the other two groups because I [49] don't know the breakdown of the other two groups.

Q So, is it fair to say that to create four Hispanic districts would provide double representation to the citizen voting age population?

A Yes.

* * * *

[50] Q In your opinion as a political scientist or as a political scientist—let me rephrase that. Do you have an opinion as to whether proportional representation provides equal representation for all groups?

A I see those words as being synonymous; proportional is equal.

Q Are you aware of any respected political scientists who would contend otherwise?

A No. Matter of fact, I think a number of respectable political scientists like Rudolph de LaGarza and Rodney Hero and a number of respected—Al Karnig—K-a-r-n-i-g—and African-American political scientist Michael Preston, Paula McClain, would all say that that's a silly idea.

* * * *

[60] Q All right. Now, back to Defendants' Exhibit 15. Just tell us what this demonstrates, Doctor, very briefly.

A All it does is summarize the election returns and percentage them for the—one, two, three, four, five, six, seven—eight elections that are contained in the Brace report that was filed with the Court months ago as to who won what [61] particular elections; identifies the Hispanic surname candidates and shows who won.

You will note at the bottom that it says that "All the above candidates who prevailed were the candidate of choice of Dade County Hispanics." And that's all contained in Dr. Brace's report. Not a single one of these are occurrences where the Hispanic-preferred candidate lost.

Q So, sir, to your knowledge have any Hispanic candidates—not Hispanic candidates of choice because we don't know that for sure—but have any Hispanic candidates from the State Senate been defeated?

A Yes. Diminguez, in the first line up there. The actual candidate of choice was Dexter Lehtinen when he ran for the State Senate.

Q Was Lehtinen the candidate of choice for Hispanics?

A Yes, he was.

Q So, in terms of what you know of Hispanic candidates of choice for the State Senate, have any of them been defeated?

A No.

JUDGE VINSON: Let me ask you which plan are these district numbers from?

THE WITNESS: These are analyses of the current districts. These are the actual election returns from the elections in '86, '88 and '90 that were conducted in Dade County involving Hispanic candidates as a candidate.

[63] Q All right. Even if some of them were indeed polarized, the fact remains, does it not, that candidates of choice were indeed elected?

A Yes; yes.

Q Doctor, in your opinion as to percentage of the citizen VAP, are Hispanics registered to vote at rates comparable to those of other groups in the electorate? Is the percentage of the citizen Hispanics registered to vote at a rate comparable to those of others in the electorate?

A Yes, in Dade County.

Q In Dade County; that's correct. As a percentage of the citizen VAP, are Hispanics turning out to vote at

rates comparable to those of other groups in the electorate?

A Yes, and sometimes even greater.

* * * *

[67] Q Are you aware of anything in the record or otherwise that suggests that Cubans in Dade County are in anyway disadvantaged [68] in their ability to participate in the political process and to elect candidates of their choice?

A No.

Q Doctor, I have one more question concerning the creation of four Hispanic districts.

A Yes.

Q Would the creation of a fourth Hispanic district in Dade County in your opinion produce any additional elected candidates of choice for the Hispanic population, creation of a fourth district?

A No, I do not believe so.

Q Would it have any impact on the three districts that have been created in the State's plan?

A Yes, I think that in my judgment to create four Hispanic VAP majority districts in Dade County will result in the dilution of the Hispanic ability to elect candidates of choice in the current districts that now exist or the districts that are in the Florida plan.

Q And in your opinion what would be the impact of the creation of the fourth district on the opportunities for blacks in Dade County to elect candidates of their choice?

A It decimates it.

* * * *

[97] BY MR. HEBERT:

Q It's not your testimony, is it, that Hispanics need to be a majority of the people turning out in order to elect a candidate of their choice or a Hispanic candidate?

A No.

Q Now isn't it also a fact that under the three state Senate districts in the SJR-2(g) plan, as well as the three

[98] districts under the—three of the four districts under the HRB plan, that the turnout statistics come out somewhat similar, do they not?

A No, they do not.

Q Well, let's focus on some of them. Maybe I should amend my question to say I'm not asking for uniformity, but generally speaking, isn't it a fact that with regard to the HRB plan, for example, that the three districts you have listed at the top, the 34, 33 and 40, that the Hispanic percent turnout is 42.9 percent or above in all six of those races, isn't that true?

A Yes.

Q And isn't it also true that the highest is 51.3, and that several are in the high 40's, 49.4, 47.3 and there's a 45.5 and a 43.1, isn't that right.

A Are you talking about the HRB plan.

Q HRB plan, that's what I asked.

A Yes.

Q SJR-2(g), let's compare that. Isn't it a fact that all of the districts are in fact starting at a threshold lower for Hispanic turnout, here 41.7 in the 1990 race, ranging up to a high of 59.6 percent, and you have four of the six elections at 49.2 percent or below for Hispanics, isn't that right?

A Yes.

[99] Q And you also were—you were in the courtroom—you've been in the courtroom throughout most of the testimony in this case, haven't you? Much of it?

A Much of it, I'd say, yes.

Q Did you hear any of the testimony from Hispanic legislators about how they perceived some of the district, senatorial districts as being packed with Hispanic voters?

A I don't recall that testimony.

Q Did you ever hear any testimony in this case about packing Hispanic voters in the district?

A I don't recall that.

Q You didn't hear that. Okay. I understand you to say that elections where presidential candidates are on the

ballot are elections where Hispanic voters tend to turn out in higher numbers, is that true?

A Yes, sir, I did.

Q Is the governor's race in the State of Florida a race which is held in the same year as presidential elections?

A No, it is not, unless there might be some reason of a special election, but normally it isn't.

Q So the one race you did analyze, that 1990 race, you said that was the Governor Martinez race, that was not a race run in a presidential election year when voter turnout for Hispanics would be at its highest, isn't that true?

A That's right, it's a midterm election.

[100] Q And the election prior to that was 1986 and that also involved Governor Martinez, did it not?

A Yes.

Q You didn't analyze that one?

A I did not do any analysis for that election.

Q None whatsoever?

A I can't recall any.

Q Did you run it for voter turnout?

A No, I did not.

Q Did you measure at all the—I'm not sure of the term you used and we'll use the term that you employ, where you plug in past election results into a district, performing statistics or, statistics by which you can measure what has happened in a district as a result of past elections. Do you know what I'm talking about?

A We were talking about that this morning, reconstituted election results.

Q Just make sure that we're talking about the same thing before we head down that road. Constituted election results are what, Doc?

A Reconstituted.

Q Reconstituted?

A That's where you take election returns that were conducted for a particular office and then you put them

into new districts so you can run a report that would show, say, [101] in the old districts, the districts that were in place until this cycle, how the elections came out. And then you reconstitute them into the new districts and you do it for every plan that's ever considered.

Q Have you done that for the races here where you have projected turnout for Hispanics where they would fall in the minority? Have you done that?

A I'm not sure I understand your question, Mr. Hebert.

Q Have you done reconstituted election analysis for these Senate districts here, 39, 37 and 34 in the State's Florida plan, 34, 33, 40 and 35 under the HRB plan, and 40, 33, 34 and 35 under the De Grandy plan? Did you do that?

A No, I have not. May I explain my answer?

Q Yes. I only asked you if you did it and you said no.

A I'm quibbling with you a little bit and I'm not trying to be unresponsive. These are all new reports that the Senate prepares and the House prepares, so simply you take those numbers from those reports.

Q But under the exhibit that you have attached your reputation to, we have virtually every single election presented here, except for the highest percent Hispanic district for the most part, but all of the other selections show Hispanics turning out at a lower than 50 percent level compared to nonHispanics, isn't that right?

A No, I believe you misunderstand that's in this table.

[102] Q Well, is it not a fact that in most of these elections that you have analyzed, you project a Hispanic total voter turnout of less than 50 percent? Isn't that true?

A Yes, but maybe I'm quibbling with words with you. What the last column shows is that you're looking at who has turned out on election day. We're not talking about turnout rates. We're talking about who's turned out and who's in the polling place, and cast a vote in that particular race, and yes, they are suggesting that in many of

these cases you would not have a majority of Hispanics constituting the electorate that day.

Q And your testimony is that Hispanic districts drawn under some of the alternative plans would not, using data such as these voter turnout statistics you've generated, would not give Hispanic voters a certain opportunity to elect their preferred candidate to the State Senate, isn't that right?

A Yes, may I explain my answer?

Q I just asked you yes or no.

A They would not be enough voters by themselves to elect a candidate of choice.

Q But that in part, again, is based on turnout statistics, what you have generated that show in many of these districts, according to your calculations, that Hispanics are less than 50 percent. That certainly is one of the [103] factors you're taking into account?

A Yes, sir, yes, sir.

Q Now, I'd like to do what you didn't do. Let's go first to the State's plan and examine how Governor Martinez did in 1990 in these districts where Hispanics were a minority of the people turning out, because I think it's your position that, at least as to the District 39 there listed under SJR, that you would agree that in that district Hispanic voters are very likely to elect their preferred candidate, would you not?

A They could, if they were relatively cohesive.

Q And you don't—you're not here testifying that Hispanic voters in Dade County are not a politically cohesive unit, are you?

A Their cohesion varies across elections. It's not always the same in every election.

Q That wasn't what I asked. I asked you: You're not testifying that Hispanic voters in Dade County are not politically cohesive? That is not your testimony, is it?

MS. BUTLER: I object, Your Honor, I think that it was his testimony that they were not cohesive.

JUDGE HATCHETT: Objection overruled.

THE WITNESS: I guess I'm confused. Excuse me for—

BY MR. HEBERT:

[104] Q Let me try one other question. You would agree that certainly there are certain parts of Dade County where Hispanic voters are politically cohesive? Can we agree on that much?

A Yes.

Q And can you identify those sections of Dade County where Hispanic voters are not politically cohesive?

A By that you mean not cohesive with other Hispanics?

Q No, I mean Hispanic voters not being politically cohesive.

A I'm having trouble with your words, Mr. Hebert, and excuse me for pronouncing your name wrong, I didn't mean to do that.

Q Well, I see that you one time taught at LSU where they have quite a few Heberts, some more famous than I.

A Well, I guess what's giving me trouble is part of what underlies my examination of all this data is the knowledge that not all Hispanic homogenous precincts behave the same way, okay? And that there will be some Hispanic areas of Dade County. The ones, for example, that are Cuban will act a certain way. There are ones that have fewer Cubans and more non-Cubans that will act different ways, and that's why I'm having some problems with the word cohesive, and I think that's where I'm having trouble.

Q Let's go back then to the Martinez race rather than [105] spend our time on cohesion. Isn't it a fact that in the 1990 race, according to Government Exhibit 7, that in that race, 1990, the very election you analyzed there for Senate District 39, under the State's plan, where you have 1990, 54.3 percent of the Hispanics turning out, according to Government Exhibit 12—Do you see that

figure on your exhibit, 54.3, the second figure down, 1990, under SJR-2(g)?

A Yes, but you're talking—for the purposes of the record, you're talking about Senate Defendant's Exhibit 12, not government exhibit.

Q I'm sorry, right, Senate Defendant's Exhibit, right, you see that figure?

A Yes, sir.

Q And according to Government Exhibit 7, which we have in the record and—55 percent, Martinez won 55 percent and Chiles won 45 percent. So that district is a district in which Martinez carried, is that not true?

A I don't have that exhibit up here. Is that in Dr. Lichtman's report, one of the exhibits he used?

Q No, I don't believe—this is a document the State of Florida—

A May I see it?

MR. HEBERT: May I approach the witness?

JUDGE HATCHETT: Sure.

THE WITNESS: Yes.

[106] BY MR. HEBERT:

Q And I would also ask you, isn't it also true that with regard to District 34, a district that according to your analysis only 41.7 percent of the Hispanics turned out to vote, the Hispanics were only 41.7 percent of those who actually turned out to vote, that Governor Martinez even carried that election in 1990, a nonpresidential election?

A Yes. Governor Martinez barely carried it, 50.1 percent.

Q Let me recite for you also the third district which Governor Martinez received 48.7 percent of the vote in 1990, which was the District 37. So he was just under a majority in the third one. Now I would like to ask you if you have—did you ever examine, even though you did not perform the analysis, but did you examine how

Governor Martinez's 1986 race turned out in those districts?

A I don't recall doing so.

Q Well, according, again, to Government Exhibit 7, Martinez, running in 1986, carried 66.2 percent of the vote in 1986 in District 34, 63 percent of the vote in District 37, and 68.4 percent of the vote in District 39, according to Government's Exhibit 37—I'm sorry, Government's Exhibit 7.

Now you, I believe, have not done any kind of analysis with regard to neither the De Grandy or the Reaves/Brown plan, have you, with respect to whether or not [107] these districts would have resulted in Governor Martinez carrying the election in those districts?

A I understand from Dr. Lichtman's report there were some problems with that.

Q But you didn't perform an analysis, did you?

A I'm sorry to differ with you, but I don't know—I don't perform these analysis because those are already done in the reports. Just like you showed me that exhibit, I could go to that exhibit and take that number out of there and report it, but I don't perform—I did not personally perform those analyses, or no one under my direction performed those analyses.

Q Those analyses, according to the record, Doctor, show that with regard to the De Grandy plan, for example, 1986, Martinez carried District 33, 34 and 40 by over 62 percent of the vote, in District 35 where he captured 52.8 percent of the vote, and under the Reaves/Brown Senate plan for those four Hispanic districts, the record shows, according to Government Exhibit 23, that Governor Martinez carried all four districts that were Hispanic VAP majorities in excess of 60 percent of the vote?

A This was in 1986?

Q Correct.

A Yes.

Q The elections for the Florida House and Senate, are they [108] in presidential election years? Do they get held in presidential election years or in off-presidential election years?

A Depends on whether they're odd numbered or even numbered.

Q Are their presidential elections scheduled in 1992?

A Yes.

Q Are there any Senate and House elections scheduled in 1992?

A Yes, all Senate seats are up this year either for two-year terms or four-years terms.

Q What about the House?

A Of course the House.

Q What about in 1980—I'm sorry 1996, the next presidential elections, will there be any seats up for the Florida State House, State Senate in that year?

A Half of the Senate seats. Twenty up in the regular cycle, and maybe there will be some special elections.

Q And all the House seats, isn't that correct?

A All the House seats, yes.

Q Your calculations of Hispanic turnout, they do not take into account at all, I take it, any degree of crossover voting that takes place? In other words—

A Crossover voting doesn't get involved in turnout estimates, no.

[109] Q So we simply can't look to the turnout statistics and see that Hispanics are in the minority, and even if we conclude there's political cohesion among Hispanics, conclude from that information alone that Hispanics won't be able to elect their preferred candidate, can we?

A No, you can't conclude that.

Q I'd like you to also next focus on Exhibit 13, which is your compactness exhibit. And I tried to listen carefully to what you said, and if I misstate this, please correct my mistakes, but I thought I heard you say that the population polygon test was considered by you to be the best test?

A Well, I said I think you might consider it to be a little better than—you might consider it to be a little better than the others, and the reason for that is that it's more sensitive to the location of the populations, the density of populations, than are the other two methods.

Q In what way is it more sensitive to population density?

A The greater the concentration of the population, in a certain segment of the district, the greater the likelihood that you're going to have compactness. I could illustrate that for you with, let's see, what's the plan that shows it I think, pretty well? Notice in district—I have some difficulty. I'll have to go to a map because the may for the district—

[135] A I have analyzed the turnout for those particular districts, what was the turnout on election day. Okay, for those districts. It is my opinion, based upon that analysis of turnout, the same kind of analysis I did for the Hispanic districts, that those districts are designed—and I'm sorry to use these words, and they may be offensive to some people in the courtroom, but they're designed to waste African American votes.

Q Is that the phenomenon that is known in the—this area of the law as "packing"?

A Yes, sir, they are, they're packed, and there are more African Americans than are necessary to provide a realistic opportunity for African Americans to elect candidates of choice.

Q Do you have an opinion about whether on not this packing [136] phenomenon has an impact on the ability to draw a third district in the South Florida area with a black majority voting age population?

A I believe what I've seen in the two plans, if you go further north from Fort Lauderdale, that neither of them have a VAP majority district that's African Ameri-

can. And furthermore, I did tests of, again, turnout tests for those particular districts, just to see how they would work, and they fail miserably in terms of their ability to put African Americans in control on the general election day.

Q So if I understand you, you believe that the packing of the Districts 32 and 36 does in fact have a negative influence on the ability to create an additional majority seat just to the north?

A That's right, and that's why I said this morning on my direct testimony that I thought what I saw in the attempts to create four Hispanic VAP majority districts in Dade County had a decimating effect on African American voting age population in South Florida.

* * * *

TESTIMONY OF DANIEL WEBSTER

TR VOL. VI

* * * *

[75] MR. CROWLEY: Yes, Your Honor. I, as well, am somewhat optimistic on Escambia. One witness has been put on already. The case, I think, would be getting a bit disjointed if we have to do it in three pieces. So that's my problem.

I also wanted to advise the Court of a filing I made just before the—or just after the lunch break. I filed a document entitled notice of Filing of House Representatives Remedial Plan. It's become apparent to us, since we're on this break-neck pace, that when the Court rules, and if it rules adversely to us, that we'd be scrambling to put an alternative before the Court.

So we have filed this in the event that the Court rules adversely to the House Defendants. We do, however, in the notice, expressly reserve all defenses, including the [76] previous articulated position on jurisdiction. Having said that, I would—

JUDGE VINSON: That's a third alternative plan then, is that what that is?

MR. CROWLEY: We're not asking the Court to at all consider this alternative at this time because we think the Florida Plan should survive this scrutiny. This is in the event that the Court rules adversely to us, and I think under the case law, the House Defendants are entitled to submit a fix, if you will, that does the least disruption to the approved portion of the legislative product.

So this is to get ready. We don't—hopefully it won't be necessary from our standpoint, but I did want to bring it to the Court's attention so everybody in the room would know why we are doing this.

* * * *

CLOSING ARGUMENTS

TR VOL. VIII

* * * *

[8] JUDGE VINSON: We'll grant your motion to participate in an amicus capacity under these conditions: That you take the case as you find it, in the present posture and status. You have to comply with the same procedural requirements concerning evidence as anyone else and there will be no delay in anyway in order to afford you an opportunity to do it. And to the extent that there is oral argument on the remedy, which we anticipate we'll be hearing today, we'll allow you to participate in that. To the extent that there may not be an opportunity to file anything further in the way of affidavits or legal memoranda, you need to be aware of that.

* * * *

[16] Now, the other point is that this morning, Dr. DeGrove testified, and I went through this in some detail in cross examination because I wanted to make it abundantly clear to my satisfaction that he was saying that 55 percent of the Hispanics in—of voting age—in Dade County were non-citizens. And the reason I wanted to

be real clear on that was because I knew it varied with the statistics that Dr. Weber had used.

So, I called Dr. Lichtman. And I had mentioned to the Court I had spoken to him early this morning at 1:30 or so. And what I said to him was the statistics, the percentage now is different. And he said, well, it seems to me we—my affidavit still rebuts that testimony because if you use the statistics used by Dr. Weber, it actually rebuts the information offered by Dr. DeGrove. So, I said, well, then in that case fax me the declaration that you read to me last night and I will read it over and decide whether it does. I did so. And I offered it and I am one hundred percent convinced that it responds not just to the defendants' CVAP case—citizen voting age population case—offered yesterday, but in addition it rebuts the additional testimony on that issue today, which until yesterday we really hadn't gotten into. We went through the C word yesterday for the first time. And it's in rebuttal to all of that that this affidavit goes.

* * * *

[25] (Pause)

MR. HEBERT: May I proceed?

JUDGE HATCHETT: You may proceed; yes, sir.

MR. HEBERT: Thank you. First of all, let me express on behalf of all of the parties the appreciation for the Court's patience in an extraordinary presentation of evidence, multiple parties and multiple counts. We are very grateful for that opportunity.

The issues that are before this Court today are of extreme importance to Hispanic voters in Dade County. They are important issues to black voters in the Dade County area. And, to be sure, they are also important to white voters in Dade County.

But this case is not about Dade County. There is no barrier around the boundaries of Dade County other than a county line, which the state of Florida has routinely crossed for political purposes when it needs to.

The State's defense in this case basically boils down to you carve out Dade County from the state of Florida and then you look to see how many districts you can draw in Dade County.

Well, the state of Florida is governed by the Florida Senate and the Florida House of Representatives. It is not the Dade County Senate. It is the Florida State Senate. And districts that extend beyond the boundaries of [26] Dade County that include Dade County residents have been drawn by many witnesses in this case to be Dade County districts, even if they just include some or a minority of Dade County population.

So, I would like to begin simply by pointing out that this is a case about minority voting rights not simply in Dade County and that the United States does not present this case simply on behalf of Hispanic voters. The United States is deeply concerned that black voters be given their opportunity to participate effectively in the political process under any plan that is put into place by the Florida state government or by this Court.

* * * *

[33] MR. BURR: May it please the Court. The NAACP has appeared before this Court over the past five days to present two challenges to the Florida plan under the United States Constitution and the Voting Rights Act, one having to do with the House district in Escambia County and the second challenge being to the Florida plan's Senate districts in South Florida that have the effect of diluting the voting strentgh of blacks. And I emphasize the word "blacks" as opposed to Hispanics in the South Florida area.

Given what we have been through for the past five days and the record that has developed here, I submit to you that the record is absolutely crystal clear that a Section 2 violation exists with respect to black in South Florida. And not only is that Section 2 violation manifestly clear from the record itself, but I submit to Your Honor that the case that has been made out under Sec-

tion 2 with respect to the Senate districts in South Florida is completely unrebutted. No attorney for either party on either side of this room has come forward in an effort to challenge the evidence that has been proffered to the Court by the NAACP with respect to the Senate problem.

What then exactly is the evidence that comprises the NAACP's Section 2 case in South Florida? What are the elements of a Gingles analysis that we believe the record reflects here? First of all, Mr. Guthrie [34] testified that blacks are sufficiently numerous and geographically compact to permit the drawing of three black majority VAP districts in South Florida. That testimony is in Volume 4, Pages 200 to 202.

Mr. Burke, Representative Burke, came in here this morning and corroborated that testimony. And if that's not enough, NAACP Exhibit No. 1 demonstrates in very graphic form that it is possible to draw three majority black districts. So, I submit to Your Honor that that makes out the element of the first prong under Gingles.

Secondly, Dr. Lichtman testified that blacks in Dade County and the surrounding areas are politically cohesive and, in his words, that they unite in large numbers behind candidates of their choice. That testimony is in Volume 3, Page 35. And if that testimony in and of itself is not sufficient, the evidence in the Congressional phase of this hearing is replete with similar types of testimony not only as to Dade County but the surrounding areas in South Florida. And I submit to Your Honor that that establishes the second prong of the Gingles test.

Thirdly, Dr. Lichtman testified that a pattern exists in South Florida of Hispanics and whites combining their political strength to defeat the election of candidates of blacks' choice. And, there again, if the testimony of Dr. Lichtman standing alone is not sufficient [35] to establish that point, I submit to Your Honor that that is the very essence of what the case of Meek versus Metropolitan Dade County was all about, an 11th Circuit Opinion. And this Court can certainly take judicial notice of the

District Court's record in the Meek case that establishes that point abundantly.

Faced with this record, the NAACP believes that it is incumbent upon this Court to order the creation of three Senate districts in South Florida with a 50 percent or greater black voting age population. In fact, I would submit to Your Honors that Section 2 of the Voting Rights Act requires the creation of just such districts.

Now, the problem for us is that such a remedy presents this Court with a problem, with a dilemma, because Hispanics may—I don't know; I am not casting a value judgment on that—but certainly the Hispanic may have their own separate and independent viable Section 2 claim.

Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. If it is possible to accomplish that solution, the NAACP supports that solution. NAACP does not seek to come into this Court and [36] advance a claim on behalf of its members at the expense of another minority group.

As I made an announcement to this Court several days ago, the NAACP has drawn a fourth replan and if the parties are ordered to submit proposed remedies to this Court, that will in fact be the NAACP's preferred remedy that will be proffered to this Court. Whether or not anybody can agree on it or buy off on it is another question, but that is the NAACP's preferred remedy.

On the other hand, what happens if this Court ultimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And

I submit to Your Honor that the record is clear that that is African-Americans.

From the Congressional trial this Court has before it Census data that is replete with evidence that in South Florida, in areas of jobs and housing and education and health care, blacks are very, very seriously disadvantaged and comparably more disadvantaged than are Hispanic groups. The record also is replete with evidence [37] that the Hispanic population in South Florida is growing much more rapidly than the black population of South Florida, thereby making it ever more difficult for blacks to elect their candidates of choice.

On the other hand, the record is conspicuously devoid of any evidence of the type that you heard over the last couple of days about a Hispanic mayor of Miami or a Hispanic chairman of the United Way campaign or Hispanic parts of Miami where it is possible to go in and get the services of doctors and lawyers and architects and accountants and all of the other social services that are needed without ever speaking a word of English.

You haven't heard that type of testimimony, I submit to Your Honor, for the reason that everybody in this courtroom knows and that is there are no such parts of town in Miami or Fort Fort Lauderdale or anywhere in South Florida that a black has access to that sort of—those sorts of social services.

For these reasons and all the other reasons reflected in the record, if this Court is forced to make a choice between creating a third black Senate district or a fourth Hispanic district, we urge Your Honors to adopt the former solution. Thank you.

* * * *

[52] JUDGE HATCHETT: No. Court is in recess.

(Brief recess)

[53] JUDGE HATCHETT: Obviously, we have not been able to come up with a written opinion and I doubt if we're going to be able to do so in the next few hours.

But what I am going to dictate into the record at this time will serve for now as the opinion of the Court. We will also as soon as possible enter a judgment as to the Senate portion of this case to allow any party to who cares to to take an immediate appeal to the Supreme Court. Attached to that judgment will be a certificate pursuant to Rule 54-B, which authorizes an appeal as to less than all of the claims in a case, which will be necessary for anyone who cares to take an appeal.

The Court finds that the plaintiffs have shown a fourth Hispanic district can be drawn in accordance with the Gingles standard, but the plaintiffs have failed to prove that a fourth Hispanic district can be drawn without creating a regressive effect upon Afro-American voters in Dade County and South Florida.

Consequently, under Supreme Court precedent, this Court must give deference to the state policy as expressed in the Florida paln as validated by the Florida Supreme Court.

We will proceed with taking evidence as to the House plan.

MR. ZACK: Thank you, Your Honors. May the [54] Senate retire?

JUDGE HATCHETT: You may.

MR. CROWLEY: Your Honor, as to Escambia County, I preface my remarks by preserving, of course, the jurisdictional arguments we have made as to Dade County. I believe the parties have reached an acceptable resolution of that matter. Language, I think, has been agreed to and the map has been agreed to. And unless someone has something to the contrary to add, I believe that's the current posture of Escambia County.

JUDGE HATCHETT: Mr. Hebert.

MR. HEBERT: We have agreed, as Mr. Crowley says, upon the lines in the map. We have drafted a consent judgment with regard to that part of the case, the language of which is still undergoing some typing, but it has been agreed upon. There are no I believe disputes

from either side now on the language of the agrement. Who is going to actually sign on to it—the United States will agree to it and I leave it to the other parties to advise the Court whether they also wish to—those who have claims with respect to Escambia and have standing to advise the Court whether they also would.

MR. BURR: Your Honor, without having—

JUDGE HATCHETT: This deals only with Escambia as we understand it.

[55] MR. BURR: Yes. Your Honor, without having seen the document and having an opportunity to look at the language, we in principal certainly agree. And after this discussion ends I have a question, if Your Honor will entertain one, having to do with the ruling on the Senate.

MS. WRIGHT: Yes, Your Honor, again with the proviso that we haven't seen the final language yet, but we do agree. We've seen the general outlines and proposed stipulation. It appears to be satisfactory.

MR. RUMBERGER: Same for the De Grandy plaintiffs, Your Honor.

MR. GREGORY: Unfortunately, as you may find because I am advancing the podium, I have a problem. My problem is, Your Honor, that I'm in an ore tenus position to request leave of this Court to withdraw on behalf of one of my three clients. Reaves, Brown and Hargrett were the plaintiff intervenors in the various cases. Because of a difference of opinion, shall we say, I am authorized to sign the consent judgment, which I have seen, which I understand the Government wishes to make one final correction to reflect what I am saying now, and I am authorized to sign it on behalf of State Representatives Corrine Brown and James Hargrett, Jr.

However, I'm seeking leave to withdraw as attorney of record for Darryl Reaves because he has not [56] authorized me—in fact, he has disagreed with the signing of the agreement. I have discussed the same further with Representative Reaves. I thought he would be here. I know

he is around, apparently not knowing we're back In session. And he understood.

And there were two attorneys of record for the three. The other attorney, unfortunately, Henry Hunter, is literally out of the country and, therefore, unable to be here and to take over any of the last minute comments or anything else to be said on his behalf assuming the Court would grant the same. But I feel that I am in an uncomfortable situation and I cannot represent his interest at this point as it relates to the Escambia plan since he wants to—since he does not want to go along with the consent judgment which I believe will dispose of the case and the other two do.

And, again, I have also fully discussed this entire scenario with all three clients, individually and collectively. It is after much consideration that I have to move to do this now. I did not do so, although I was aware prior to our closing arguments on the State Senate part, because I was still of record for him. There was no conflict as it relates to the State Senate considerations or anything in Dade County. So, the request would be only as it relates to Escambia County but not as it relates to [57] Dade County.

JUDGE HATCHETT: Exactly what is your motion?

MR. GREGORY: The motion is to withdraw as attorney of record for Darryl Reaves as relates to Escambia County portions of the Section 2 complaint only.

JUDGE HATCHETT: And you would remain as to Dade County?

MR. GREGORY: Yes, sir; there is no conflict between the three as relates to Dade County, Senate or House in Dade County.

(Pause)

MR. GREGORY: I have also communicated the same understanding to the other plaintiffs as well as to defendants.

JUDGE HATCHETT: Well, let's ask you a few questions.

MR. GREGORY: Yes, sir.

JUDGE HATCHETT: I guess the easiest way to ask you is what is the—how do your clients have standing as to Escambia County in the first place? None of your clients reside in that county; do they?

MR. GREGORY: None of the three reside in Escambia County; that is correct. Standing is not contested, is not an issue, was never raised. Both have been involved in Escambia issues as Representatives. They [58] have voted on some things. Standing has been shown in that way, although they don't live there.

JUDGE HATCHETT: Very well.

MR. CROWLEY: Your Honor, I do believe we have a pending motion to dismiss directed specifically to the standing of these three clients. Given we're in settlement posture with two of them, I don't argue that. But as to Mr. Reaves, he does live in Miami. That's of record. With the settlement of this lawsuit, there is no case in controversy. And I think as to him he should be dismissed from the action.

MR. GREGORY: Understandably, I don't want to comment on that.

JUDGE HATCHETT: But you do agree that such a motion is pending?

MR. GREGORY: I am not aware of it. I am not aware that a motion is pending as relates to those three persons.

JUDGE HATCHETT: Do you make that motion now?

MR. CROWLEY: Yes, Your Honor, I make that moiton now, that they be dismissed or that Representative Reaves be dismissed for lack of standing.

JUDGE STAFFORD: As to Escambia?

MR. CROWLEY: As to Escambia only.

MR. GREGORY: I only ask that the matter not be [59] argued because I don't want to argue—

JUDGE HATCHETT: I understand. The motion is granted.

MR. GREGORY: My motion?

JUDGE HATCHETT: No. The State's motion they just moved.

JUDGE STAFFORD: And mooted your motion.

JUDGE HATCHETT: On the basis of standing, that you had no standing, to dismiss you as to Escambia County, that motion has been granted and that resolves your conflict.

MR. GREGORY: That was granted as to Darryl Reaves only; is that correct?

JUDGE HATCHETT: Yes.

MR. GREGORY: Okay. That was the request, Your Honor. Thank you.

JUDGE HATCHETT: Thank you.

MR. BURR: May it please the Court? On the ruling with respect to the Senate issues, as I understand the Court's ruling, it addressed the plaintiffs' claims. I belive you said the plaintiffs have proven various things. Could you please clarify which of the palintiffs that is in reference to? It appears from the substance of the order to involve only the plaintiff claims of the Government or the De Grandy plaintiffs. And I need to know what the [60] status of the NAACP's Section 2 case is because, obviously, the NAACP was not attempting to prove anything on behalf of Hispanic districts, quite the contrary.

JUDGE HATCHETT: One reason we write these things out and I read them to you is because it is a Three-Judge Court. And sometimes we don't agree on exact wording, the same as you, but I think we have a legitimate question here. And let me see if we can amend it and then I will read it to you again because that way it's the only way I can be sure that the three of us are in complete agreement. So, if you will just wait one minute.

Yes.

MR. WAAS: If you want to get into more details with respect to the Senate case, I think we ought to see if we can get Senate counsel back in here.

JUDGE HATCHETT: I don't think we need them for us to clarify the plaintiffs that we are speaking of.

(Pause)

JUDGE HATCHETT: Mr. Burr, the Court will be able to say that it has at this time ruled against all plaintiffs and in a written order there may be more definition as to exactly the rulings as to each claim, but at this point we have ruled against all plaintiffs as to the Senate.

MR. BURR: Thank you, Your Honor.

[61] MR. RUMBERGER: Judge, are you going to proceed on now to the House districts?

JUDGE HATCHETT: Yes.

MR. RUMBERGER: Just before we do, I would like to make a motion for reconsideration, very briefly, and to note that we have a plan prepared for the remedial portion, had we got to that, that would show four Hispanic districts, 65.3, 64.60 and 69.2; and three black districts with the following voting age populations: 52.5, 53.3 and 52.3, that are attached to the affidavit of Rockie Pennington, who had been commissioned by us to do this for the remedial stage.

So, at this point we have four Hispanic districts and three black VAP districts which is more than sufficient to meet any task that the Court might wish to impose and certainly would be absolutely non-retrogressive in form.

JUDGE HATCHETT: Motion for reconsideration is denied.

* * * *

[64] MR. HEBERT: Thank you. The United States stands before the Court today with regard to the House plan contending that the Florida House of Representatives has drafted a plan which minimizes minority voting strength in the Dade County/South Florida area. Now, why does it—why do I use that term "minimize"?

Under the Voting Rights Act, there are many different types of vote dilution claims that can be made. You can take a concentrated group of politically cohesive minorities and you can fracture them into a number of different

districts and in so doing deprive that cohesive minority group of a realistic opportunity to elect people of their choice, candidates of their choice, to public office by putting them in a numerical minority.

[65] There are other ways to dilute or minimize minority voting strength and that is to pack districts, particularly in the inner city, with such heavy concentrations of minority group citizens that there are not a sufficient number of minority group citizens left who could elect a candidate of their choice in a remaining district. Ordinarily when that's done, it is done by placing those persons into a—usually a white district. But as has been shown in this case, it can also be done by placing them into a black minority district or a majority black district.

In this case the record shows that Hispanics vote cohesively and that in a couple of the districts proposed by the State that are going to likely elect a candidate of choice for black voters, there has been added to that vote approximately twenty to thirty percent, in some cases, Hispanic; so that the voting strength of that group is going to produce an African-American Representative to the House, which if standing alone, there would be no voting rights problem.

But what it does is it fractures off the Hispanic population into that district as well, thereby depriving Hispanic voters of opportunities elsewhere to elect candidates of their choice.

Now, we have all heard the term and the Court [66] used it when it talked about this in the Congressional case, something called a super majority. And the super majority term that the Court employed in the Congressional case was one in which Hispanic VAP's needed to be over a certain percent, generally recognized as a rule of thumb somewhere in the 60's, somewhere 60 percent Hispanic VAP or above. And it took extra Hispanic population and placed them in Hispanic districts. So that in some districts under the plan drafted by the House of Representatives, you have Hispanic VAP districts of 83.64 for district 110, for example, or 76.56, district 111.

Now, the consequence of doing this was that there were opportunities not available to the State elsewhere to draw districts where Hispanic voters could elect a candidate of their choice without any contrasting arm to any of the black districts. There has not been—and this is a very important part of our case. There has not been any testimony that if the Hispanic population were removed from the African-American districts, that those districts would still not be a viable district for African-American voters. In fact, most of the testimony has demonstrated quite clearly that Hispanic voters and black voters often prefer different candidates of their choice.

So, the State plan draws nine districts in the [67] South Florida area. The alternative plans draw eleven. We all agree on that. There have been all kinds of measures of whether or not the districts drawn will give Hispanic and black voters an opportunity to elect candidates of their choice. Dr. Handley, who was on the witness stand yesterday, testified to two very important things. And I might add that in their own EDS reports they demonstrate this fact and it's in writing in their own reports and their testimony was consistent with it yesterday, the EDS study. These are the State's own experts, by the way.

What did it show? It showed that Hispanics are politically cohesive, that there is a racially polarized voting and that it also proved that under the definition used by the State's own people, there were more effective minority districts under the alternative plans than the State's plan. Now, what has been the criticism of the State to the alternative plans? The major criticism has been that they might teeter/totter and maybe they're not going to elect these alternative districts drawn by the plaintiffs. They might not elect with certainty, with safeties, a guarantee that a minority candidate would be elected.

Well, I submit to you that is not what the Voting Rights Act requires. The Voting Rights Act requires an equal opportunity to elect, not to be sure. The [68] popu-

lations placed in these districts under the alternative plans are almost certain to be, as Dr. Lichtman said, rock solid and will elect a candidate of choice because some of the districts have a high percentage of population and there is racially polarized voting. But all of the districts—this is the key point it seems to me: All of the districts drawn under the alternative plans using a definition that Dr. Handley extracted from Section 2 of the Voting Rights Act, when she characterized the district as competitive, the language she used was it will give an equal opportunity to elect.

So, the State has admitted for purposes of this case that there are more districts that meet the requirements of Section 2 of the Voting Rights Act under the alternative plans than under the State's plans. And that's really what this case comes down to.

So, we submit that taken together with the totality of circumstances and the proportions of districts and so on that has been presented, the history of discrimination, the socioeconomic disparity that minority people face and so on, that the districts drawn under the alternative plans demonstrate quite clearly that Hispanic voting strength has been minimized in the sense that it has not been given an opportunity to be fairly reflected.

And one last comment and that is about [69] citizenship. And I find it odd, indeed, that the State would take the position in this court that for purposes of redistricting, non-citizens need not be taken into account, because that's really what they're arguing here. They're saying look at the citizenship rates. And for those people who are non-citizens, you don't need to look at their position with regard to the Gingles test in redistricting, in measuring districts.

That not only cannot be the law in this country, but it is not even a practice followed by the House when they did redistricting themselves, because they counted everybody of voting age population, not only when they did

the redistricting but when they measured the district for political continuity.

We submit on this record that this Court is duty bound to find a violation of Section 2 of the Voting Rights Act with respect to the drawing of House districts for the Florida House of Representatives in South Florida. Thank you.

* * * *

[78] The plaintiffs have not shown dilution of the Hispanic vote in Dade County. That is their burden. They must. Mr. Brace and Mr. Meier testified that Dade County retains 18 House districts, but that the Hispanic population in Dade is 50 percent and that the House plan creates 9 majority Hispanic districts and one Hispanic seat, 46 percent VAP.

The Voting Rights Act does not require proportional representation, but our plan guarantees, in fact, that they will have proportionate representation at an absolute minimum. We did this without compromising the interest of the African-American community as evidenced by the support of the House Black Caucus and the Florida NAACP. Furthermore, the House districts in Dade County were drawn in such a way as to preserve the seats of all incumbent minority members.

The arguments for creating more than nine Hispanic seats and an influence seat are made through misconstruction of the Voting Rights Act and totally by ignoring the Voting Rights Act charge on proportionality. The plaintiffs have argued that Dade County really includes twenty districts and that they should therefore get ten or eleven seats. But they are including in their count [79] districts that are principally outside of Dade County. And that is the key.

If you include the entire population of those districts, then a Hispanic population does not remain at 50 percent. And remember that the Justice Department has conceded that there is no requirement of maximization, Turner versus Arkansas.

Additionally, Mr. Brace testified you can only get to ten or eleven in Dade by drawing districts that will wholly fail any test of compactness.

* * * *

[82] JUDGE HATCHETT: We're not to remedy yet.

MR. DUBBIN: I'm sorry.

JUDGE HATCHETT: Well, again—

(Pause)

JUDGE HATCHETT: We're prepared to make a ruling as to the House at this time. The Court finds that under the totality of the circumstances the plaintiffs have shown a violation of Section 2 in that the plaintiffs have shown that more than nine Hispanic districts may be drawn without having or creating a regressive effect upon black voters in South Florida and in Dade County.

[83] Consequently, the Court will continue into the remedy phase of this case. We're going to take a recess at this point to give the parties a chance to discuss our ruling and see whether, with that ruling in mind, they're able to suggest jointly a plan. If not, the Court will come back, will hear argument from the parties as to the type remedy to be imposed. That could include selecting one of the plans already in the record or it could include the drafting of a plan by the Court. And during your arguments you may urge the drafting of a plan or you may support any plan other, of course, than the plan that we now find is a violation of Section 2.

* * * *

[140] JUDGE HATCHETT: Mr. Hebert, during the conversation at some point during the last five days, you indicated that the Justice Department did not submit plans, [141] but if ordered to produce a plan the Attorney General may comply. Was that—did we understand you correctly? What was your statement regarding that?

MR. HEBERT: There have been occasions when a Court has been faced with a situation where it has either

plans that it has from competing parties and the United States has been involved and it has asked the Attorney General to draw a plan and submit that plan to the Court as a sample plan for the Court's consideration. It happens rarely. It hasn't happened in a long time, but there have been occasions when it has happened.

We—our computer system, unfortunately, is in Washington, D.C. And we—if we were there, we would probably be able to have a better fix on some of these.

I will offer whatever help I can be to the Court. If the Court were to direct that we get inolved in actually drawing the lines, I could actually start to do that down here with assessing the State's computers. Even my statisticians and demographers and so on aren't here. It's just the lawyers. And although my two lawyers have a great deal of expertise on the computers, I'm not sure that we really advance the ball very far.

JUDGE VINSON: How long would it take you to do that?

MR. HEBERT: What I would do—and I'll answer [142] your question this way and I'll try to give you a time. But what we would do, I think if I were trying to fix this, I would take the De Grandy or Hargrett, Reaves and Brown districts in the Dade County area and then what I would do is tell the State to fix the rest. So, in other words, you take the Hispanic districts as drawn by the De Grandy plan so that they don't have a concern about those districts and the black districts continue to be safe, I would take those. And then I would let the State fix the rest of the area to reduce as much as possible the ripple effect. And they have that capability.

JUDGE HATCHETT: All right. Thank you. You've answered our question.

MR. CROWLEY: Your Honor, I would respond by saying that is—

JUDGE HATCHETT: We don't want a response at this point.

(Pause)

MR. CROWLEY: Is it all right for me to comment very briefly?

JUDGE HATCHETT: You don't need to comment on that. We're on to something else by now.

MR. CROWLEY: Well, Your Honor, the last—

JUDGE HATCHETT: We would like to hear your comment on this proposition: That we would order the House [143] to accept the original De Grandy plan for Dade County and then the State fix the rest as was just suggested by Mr. Hebert. What are your comments regarding that?

MR. CROWLEY: I guess that I would say it's exactly backwards, quoting the U.S. Supreme Court in Wise versus Lipscomb: "If it is not practical to defer to the legislature or other state entity, then a district court should not intrude upon state policy any more than necessary; that is to say you start with the Joint Resolution and then you make the minimal effects, not import an entirely different plan and then try to integrate the state product on the edges."

Under the Supreme Court's law, you start where the problem is, as Mr. Meier said a few moments ago. He went directly to the two districts that were targeted in the plan. The fixes were made; the legislative policy expressed was maintained.

JUDGE VINSON: We fixed Dade County and we're asking you to fix the rest of it with as little ripple effect as possible, which is exactly what the Supreme Court says. Now, can you do it or not?

MR. CROWLEY: Yes, Your Honor, the fix—and I think Mr. Meier showed—that there was virtually no ripple effect while maintaining the same number of districts, whereas he is about to show you what the ripple [144] effect is with the so-called De Grandy thing.

But I think it's important that we understand what the U.S. Supreme Court is saying. It's saying you start with what the legislature has done and you make the minimal fix. You seek to maintain the state policy. And that is what this eleven plan does.

MR. HEBERT: One problem with the suggestion that the State is making here is that by taking the boundary lines of the State's plan in Dade County and only concentrating on two particular districts where the State claims the violation exists, I think unnecessarily limits the focus that is taking place.

And I should make it clear that when I said I believed the easiest fix here and the one that I think the State is in the best position to fix and so, therefore, you are in a sense deferring to their legislative judgment and whatever political considerations exist outside of the Dade County area is that you would ask that the De Grandy plan, Hispanic districts and African-American districts all be accepted as drawn and then let the State fix the rest, which has not yet been asked.

JUDGE VINSON: That's exactly what we asked them to do. We haven't gotten that response, but that's exactly what we asked them to do. Let's see what anybody else has to say.

[145] JUDGE HATCHETT: Anyone else?

MR. RUMBERGER: I agree we want to be quick and maybe have the Justice Department involved in it. We have been involved in this process for a long time. There is absolutely no reason for us to believe that anything other than something that might be devastating to us may occur, which is not to say that the Justice Department should draw it but we certainly should have it moderated and make sure that in fact the ripple effect as required is in fact met.

I would be very, very afraid of having them just fix the Dade County and then declare, for whatever reason, that Broward and the rest of them were all in fine shape. So, I think it's going to require tab, not necessarily co-, but a tab monitoring to get us through that one political hurdle.

MR. REAVES: Your Honor, if I may address the Court?

JUDGE HATCHETT: Yes.

MR. REAVES: My concern, sir, is that in doing so, in taking the De Grandy and Reaves/Brown plan and having the State/House operate and place it upon the Florida plan, that we do not see any retrogression in the Broward County area as far as African-American districts that we have already witnessed in the Escambia area.

[146] And the other concern that I have is that when we mesh the De Grandy Reaves/Brown plan into the Florida plan, which was presented to the Court, we found that in dealing with the ripples, you actually enhance the fifth access African-American district in Dade County up by I think it's 2.1 or 2.3 points. So that possibility exists. I know you are not looking for that possibility. We don't want retrogression in the Broward County area. And if justice is for the end, there may be possibilities to correct some Section 2 violations that we have not addressed here in this Court. But we do not want the spliting of black communities in Broward County to protect any incumbents or anything of that nature.

JUDGE HATCHETT: Thank you, sir.

MR. GELLER: Your Honor, my name is Representative Steve Geller. I was one of the people that moved to intervene earlier and was admitted instead for the sole purpose as acting as friend of the Court, amicus curiae.

Would it be permissible, since the attorneys—I am a member of the bar and I am a member of the federal bar—to very, very briefly address this because this is exactly the concern that we were worried about and I promise I can do it within two minutes.

JUDGE HATCHETT: Two minutes.

[147] MR. GELLER: Thank you, Your Honors. Particularly Justice or Judge Vinson—I'm sorry, Judge/Justice—the concern that we have and the reason why the people that tried to intervene earlier or instead decided to go amicus curiae would be vehemently opposed to this proposal because I don't think—I'm not sure if

Your Honors' understanding is that the changes are not solely within Dade County.

If we accept those proposals, it will take all of southwest Broward and put all of southwest Broward into seats which are dominated by Dade County. It's taking specifically that area that we had discussed, Century Village, and taking that out of southwest Broward, putting it into a seat in Dade County. It takes the Jewish Community Center in Davie and puts that into a seat that goes all the way down to Perrine.

This is exactly what we were arguing against. This is what we're hoping that Your Honors will not order. We are hoping that as the State had indicated they can do everything within the boundaries of Dade County, please let them do it within the boundaries of Dade County. Don't take away the entire southwest portion of Broward County, which is also an area, as we said earlier, which is a community of interest, where you do have a large number of Jewish constituents, that you are intentionally dividing [148] them. And that's the only reason that they're doing this, to create additional seats. You're putting people that don't belong in Dade County seats into those Dade County seats.

I am asking you please not to do that. If there is a way of doing their Dade County things within Dade County, which they have indicated they can, please don't take away southwest Broward from Broward County. Thank you very much.

JUDGE HATCHETT: Thank you.

Any other comments on this? Mr. Wallace.

MR. WALLACE: I understand, obviously, this is the Court's order. We're going to do our best to comply with that. I want to ask you for a little bit of flexibility. Representative De Grandy said that under his plan, that Monroe was the same and Collier was the same. That's not the case. And I think as I look at the map, think about the kind of rotations in populations we need to do, if we at least had the flexibility to restore Dade and

Monroe Counties—I'm sorry—Collier and Monroe Counties into the configuration they were in our plan, we would minimize the intrusion into Broward as well, of course, into Collier and Monroe, from the, you know, from the differences that are in the Joint Resolution from the De Grandy plan.

[149] I'm just asking. We'll do our best with the Court's order with respect to working around the minority districts, but Monroe and Collier don't have to be done the way that they were done in the De Grandy plan. And it will make the implementation and the minimization of the ripple effect much easier if we had the opportunity to work with those counties as they are in the Joint Resolution.

JUDGE HATCHETT: Thank you.

Mr. Russell, do you care to be heard?

MR. RUSSELL: Yes. Your Honor, I think it's fairly obvious that on both sides of this podium you have absolutely no objectivity. Therefore, it seems to me that the most reasonable approach to this is for this Court to identify someone who has the expertise to do this, let them be supervised by the Justice Department and you give them specific instruction, for instance, as you have already done, that you want eleven Hispanic districts. I assume you want four or four and a half black districts, as has been proposed and instruct them to look at Dade and Monroe, because you have to consider Monroe and to some extent Collier, probably, to do this and have them draw that.

And I would further suggest to you, Your Honor, that the way—the easiest way for you to do this might be to instruct the Senate staff under your specific direction [150] and under oath to you to carry out his function, supervised by Justice, with input from the House.

JUDGE HATCHETT: Thank you.

MR. GREGORY: One of the last things that we want to do, Your Honor, is to have another evidentiary hearing to resolve disputes. Whenever I leave here, whenever

that is, I want to go to Jacksonville and don't come back any time soon. On behalf of Reaves/Brown and Hargrett, those Representatives who are going to be here for whatever special session are going to be here, but frankly, Your Honor, we would much rather have, as you have already proposed, Judge Vinson, take the existing, whether you call them De Grandy or Reaves/Brown Hargrett is not of particular concern to us in terms of the title, in terms of the name. Take those existing districts; Justice itself can supervise to make certain that it's done right. My concern is if you give it to the leigslature to come up with something, if it is not all the way correct and it goes to Justice, Justice doesn's agree with it, you are looking at a new fangled, informal preclearance where they may come back and tell the House didn't like it, the House says this is the way it's going to be and you have another evidentiary hearing.

We submit, Your Honor, that—I know it's rarely done and I know that Mr. Hebert has a lot of other [151] things to do, but if we all go to something that we're going to take those existing districts and if Justice takes it from there and does it and fills in the gap, we can resolve the problem. If the Court is ordering Justice to go ahead and fill in the gap correctly, then you can avoid what the NAACP is saying or I won't acknowledge that I agree with it because I don't. But you can avoid the left hand and the right hand going back and forth because you have Justice involved and you know it's going to be done right because you know it exists in districts and you know they will minimize the injury and they will submit to you as a Court-ordered plan.

We can avoid evidentiary hearing because chances are, if they come up with it by themselves, we're not going to like it. If we come up with it by ourselves, they're not going to like it. So, just give it to Justice with directions from the Court but first take into account the existing districts as already agreed upon in Hargrett and De Grandy because we know it works regardless of the form.

We have had God knows how many reports and analysis and testimony. So, you have enough of a record there to avoid another evidentiary hearing on the basis of those districts by themselves.

JUDGE HATCHETT: Thank you.

MR. DE GRANDY: Your Honor, very briefly, let [152] me take issue with Mr. Russell's statement and agree also with Mr. Russell's statement. I take issue that there is not objectivity on both sides of the table. We were objective enough to identify a Section 2 violation, bring it before this Court and you were objective enough to find that that was a meritorious argument.

Let me agree with Mr. Russell that as to the surrounding areas of minority districts we have philosophical in principal disagreements as to how to fit that plan. I would, therefore, join in Mr. Russell's request in so far as the surrounding areas of the De Grandy minority districts are concerned.

Our suggestion to Your Honors would be that you accept the black and Hispanic De Grandy districts in toto, that you then either appoint an expert or direct the State with the Department of Justice supervision, preferably even have the Department of Justice draft the ripple effect only. Your Honors have already examined, taken testimony on those minority seats and found, I think, implicitly at least at this point that they are the right thing to do for the minority districts of the state of Florida. Rather than come back here and argue about those districts, the rest of the surrounding areas are just political decisions that need to be made fairly.

If they're done with supervision by the Justice [153] Department, if they are done by an independent expert and thereafter ratified by this Court, we are objective and we would be satisfied with that result. Our contention from day one was that there were Hispanic communities and black communities in Dade County that were suffering from dilution of their voting potential.

We have come to you. You have agreed with us. You have been objective with us. We agree that there needs

to be some resolution of the surrounding areas. And we agree to an objective solution of those surrounding areas, if there is no agreement by the parties, by someone Your Honors have faith and trust in to do that job and to do it with the minimal impact possible to the state of Florida plan.

We are very happy that the minority districts will be created and I think in order not to get into a Section 2 argument as to whether the new remedy is violative of the Voting Rights Act, the best result is to accept those in total and only fix the surrounding areas by way of independent expert. Thank you, Your Honors.

JUDGE HATCHETT: Thank you.

MR. CROWLEY: Your Honor, just to the last point: If in fact the Court so orders, we'll, of course, abide. But as to the surrounding area, I mean, that is directly the case that I quoted before: Who better to [154] understand legislative intent than the branch of the legislature that constructed it in the first place. This is the domain of the legislature and the legislature ought to be given the first opportunity to make the adjustment pursuant to the Court's order.

It is certainly inappropriate to have a third party undertaking it. The object is to minimize the impact of what the legislature has done and cure only the narrow violations.

MR. RUMBERGER: May I have the last word, Your Honor?

JUDGE HATCHETT: No, they're people ahead of you.

MR. RUMBERGER: Oh, I'm sorry. Next to the last word, Your Honor?

JUDGE HATCHETT: We won't go around again.

MR. REAVES: I apologize, Your Honor. If we, in this order, if the Court can in its order for the Senate or the House to implement the De Grandy Reaves/Brown plan to the Florida plan, make a time certain as to completion of that project. I have lived in this Court.

I have witnessed the dilatory tactics on the House and Senate side in saying they can't produce plans and suddenly appearing with eleven seats and then it takes time to present maps and then marching in with graphs, more graphs. If we could [155] have a time certain with that order, it would be greatly appreciated.

MR. RUMBERGER: Your Honor, let me only say that the effort on the part of—we spoke to Mr. Crowley, particularly—have the legislature correct it does not mean have the legislative staff do it or the chairman of the committee do it or the lawyers do it. If he wants to talk about the legislature, let's get them back in session.

In the meantime, this Court has found a violation of Section 2. We have proposed remedies including De Grandy and we would respectfully request that the Court adopt the De Grandy plan and make as was suggested by the Justice Department or have someone do the ripple effects under the supervision of the Justice Department, because that's the only way we believe we'll get a square deal. Thank you.

MR. WAAS: Your Honor, if I may, I am obligated to point out to the Court on behalf of the Secretary of State that qualifying for certain offices requiring precinct lines to be drawn begins this coming Monday. And if we're talking about Dade County and yet other counties, it becomes a more exacerbated problem. I just need to point that out.

JUDGE HATCHETT: We are well aware of all of that and some other considerations, also. For example— [156] MR. RUMBERGER: Judge, I don't know if it's been pointed out but in order to run you have to resign tomorrow. You have to resign ten days before the election and tomorrow is the day.

JUDGE HATCHETT: Well, all of us know what the problems are. Number one, one of the worst things that could happen would be for our rulings here to be appealed and our rulings reversed after the election. That's the first thing.

The second thing is getting an expert takes time. We'll get into the position where someone will ask this Court to enjoin the coming election all because we're unable to agree on a plan that can be imposed and appealed to the highest court to be either ratified or rejected.

So, I think it's in every ones' interest to try and work this out rather than to go through some long procedure that's going to require either the enjoining of an election or perhaps an election after an election. And there is no reason for the state of Florida to get itself in that position.

Consequently, we're going to talk on a few more minutes here and see if we can't come to some decision that will allow us to impose a plan, I mean, in twenty-four hours. If we don't, I just want to warn everyone here that you are running a terrible risk regarding the next [157] election. Well, Judge Vinson says less than twelve hours, because I think we're at the point we're going forward where an election is being jeopardized.

Mr. Hebert.

MR. HEBERT: I just wanted Your Honors to be aware of one thing because everyone seems to allude to the Justice Department monitoring the ripple effect, perhaps. In essence, the Attorney General's role under Section 5 of the Voting Rights Act is precisely that. So, to the extent that there is a rippling effect and the State is permitted to do it, the Attorney General would be reviewing those lines because they would reflect the legislative decisions.

Now, I'm not suggesting for a moment that there needs to be any kind of delay, but the fact that there is that Justice Department monitoring that goes on to insure that there are no choices made outside of the area in the De Grandy plan that contain these minority districts. I just wanted the Court to be aware that there is that function anyway and there doesn't need to actually be someone from the Department of Justice literally looking

over the shoulder of the State, me or someone designated by me.

JUDGE HATCHETT: Is it your view that we would avoid the review by the Justice Department if you had a completely Court-ordered plan?

[158] MR. HEBERT: Yes.

JUDGE HATCHETT: Including Dade County and all other counties in Florida?

MR. HEBERT: That is correct.

JUDGE HATCHETT: You would have not have to review that?

MR. HEBERT: That is correct. The only ones that have to undergo preclearance are changes in the five covered counties that reflect the legislative policy choices of elected representatives. And if it does not, under McDaniel versus Sanchez, reflect such choices and are court imposed, then there is no Section 5 requirement.

JUDGE STAFFORD: If you had a—if you had the the parties agree, including the legislature, agree on it, would that be deemed to be a legislative plan? Or if the Court approves it, does that take it out of the legislative domain?

MR. HEBERT: It's—you're asking a very good question. If the legislature were to sign on to a consent agreement and present it to the Court, it still would reflect the legislative policy choices of the state even if it was agreed upon by the other side and was approved by the Court. The distinction is between a Court-imposed plan and one that is simply Court approved. Court approved does require preclearance; court imposed does not.

[159] MR. CROWLEY: Your Honor, Mr. Meier has Broward County. And I think that demonstrates the ripple, what ripple effect really is. We're just not talking about the margin. We're talking about an entire county being withdrawn. And that's what I come back to: The legislature has done its job there and no one has attacked that job in Broward County. It's not bene in any way diminished by this Court's action.

Again, we're going backwards. I would say to the Court the end point there is effect and the legislature will cure it. It will be done very quickly. Or we'll be back here within twelve hours. And I believe under the law, Your Honor, that that's the proper approach.

JUDGE HATCHETT: Okay. Thank you.

The Court will be in recess for fifteen minutes.

(Brief recess)

MR. CROWLEY: Your Honor, for point of information that may make it easier: We've conferred over on this side with Mr. Hebert during that short recess and are prepared, if the Court desires, to take up that suggestion and fix the ripple around the 292 plan. In talking to people that actually do the line drawing, they think that can be done in about twelve hours.

MR. RUMBERGER: We would like to know who is [160] going to supervise it.

JUDGE HATCHETT: Mr. Reaves.

MR. REAVES: Yes, Your Honor. And we would also like the Court to order that there will be no retrogression from the previous Florida plan as far as African-American communities in any of the surrounding counties of Dade County and a time certain.

JUDGE HATCHETT: We have done the best that we can with this case. It's important that the voters of Florida know where their districts are and go on with the elections.

The Court will adopt the modified De Grandy plan, the modified De Grandy plan.

The court is adjourned.

(Court adjourned at 9:45 P.M.)

* * * *

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

Nos. 92-593, 92-767 and 92-519

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF FOR APPELLEE FLORIDA STATE CONFERENCE OF NAACP BRANCHES

DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP SPECIAL CONTRIBUTION FUND
4805 Mount Hope Drive
Baltimore, Maryland 21215
(410) 358-8900

HARRY L. LAMB, JR.
PERRY & LAMB, P.A.
605 E. Robinson Street
Orlando, Florida 32801
(407) 422-5758

E. BARRETT PRETTYMAN, JR.
JOHN C. KEENEY, JR.
(Counsel of Record)
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

CHARLES G. BURR
442 W. Kennedy Boulevard
Suite 300
Tampa, Florida 33606
(813) 253-2010

Counsel for Appellee
Florida State Conference of NAACP Branches

WILSON - EPES PRINTING CO., INC. - 785-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Upon a finding of a violation of Section 2 of the Voting Rights Act with respect to African-Americans and Hispanics in a consolidated trial, should the district court have conducted full remedial proceedings prior to imposing, as a permanent remedy, the plan that it had found violated the Section 2 rights of African-Americans and Hispanics?

2. Whether the district court's factual findings that Florida Senate District 40 is a district in which African-Americans can—and ultimately did in November 1992—elect an African-American candidate of their choice is clearly erroneous, and, if not clearly erroneous, whether this Court need decide hypothetical questions about "influence" districts.

3. Whether the district court's findings with respect to the Florida House districts should be affirmed as not clearly erroneous.

PARTIES TO THE PROCEEDINGS

Respondent adopts the United States' statement.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
STATEMENT	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE DISTRICT COURT CORRECTLY FOUND LIABILITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT IN FAVOR OF AFRICAN-AMERICAN PLAINTIFFS	7
II. REMEDIAL PROCEEDINGS WERE NECESSARY	9
III. THIS COURT NEED NOT REACH ANY HYPOTHETICAL QUESTION ABOUT "INFLUENCE" DISTRICTS	12
IV. THE DISTRICT COURT PROPERLY DEFERRED JURISDICTION UNDER *GROWE* v. *EMISON* UNTIL STATE PROCEEDINGS WERE CONCLUDED	13
V. PROPORTIONAL REPRESENTATION IS NOT AN ABSOLUTE DEFENSE	15
CONCLUSION	18

TABLE OF AUTHORITIES

Cases	Page
Allen v. *McCurry*, 449 U.S. 90 (1980)	13
Barry v. *Varchi*, 443 U.S. 55 (1979)	12
Bell v. *Wolfish*, 441 U.S. 520 (1979)	8
Brown v. *Piper*, 91 U.S. 37 (1875)	6
Chapman v. *Meier*, 420 U.S. 1 (1975)	9
Connor v. *Finch*, 431 U.S. 407 (1977)	9
Cooter & Gell v. *Hartmarx Corp.*, 496 U.S. 384 (1990)	14
Growe v. *Emison*, 113 S.Ct. 1075 (1993)	13, 16
In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So. 2d 543 (Fla. 1992)	14
In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 597 So. 2d 276 (Fla. 1992)	14
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	*passim*
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981)	8
Voinovich v. *Quilter*, 113 S. Ct. 1149 (1993)	13
Wise v. *Lipscomb*, 437 U.S. 535 (1978)	9
Constitution:	
Article III, section 16(c), Florida Constitution	13, 14
Statute:	
Voting Rights Act of 1965, ¶ 2, 42 U.S.C. 1973	*passim*
Miscellaneous	
Elections 1992; State of Florida Official General Election Returns; Nov. 3, 1992, Fla. Department of State, Div. of Elections	6
S. Rep. No. 417, 97th Cong., 2d Sess. (1982)	9, 15-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-593

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.

BOLLEY JOHNSON, *et al.*,
Appellees.

No. 92-767

UNITED STATES OF AMERICA,
Appellant,
v.

STATE OF FLORIDA, *et al.*,
Appellees.

No. 92-519

BOLLEY JOHNSON, *et al.*,
Appellants,
v.

MIGUEL DE GRANDY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

---

BRIEF FOR APPELLEE FLORIDA STATE CONFERENCE OF NAACP BRANCHES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 7a-76a)[1] is reported at 815 Supp. 1550. An earlier decision in the same case with respect to congressional redistricting is reported at 794 F. Supp. 1076.

STATEMENT

The NAACP adopts the statement of the United States with the following additional details about (1) the evidence of Section 2 violations against African-Americans and (2) the evidence that Florida Senate District 40 would elect an African-American candidate.

1. On April 7, 1992, the Florida State Conference of NAACP Branches and twenty-six individual African-American voters (collectively the "NAACP") filed a lawsuit seeking declaratory and injunctive relief against congressional and legislative districts in Florida. *Florida State Conference of NAACP Branches* v. *Chiles*, No. 92-40131-WS (N.D. Fla., filed April 7, 1992). Two days later, the three-judge district court ordered the NAACP lawsuit consolidated with a lawsuit filed by Miguel De Grandy, a Hispanic member of the Florida House of Representatives, and other Hispanic registered voters. On June 26, 1992, the three-judge court ordered the consolidation of a separate lawsuit by the United States (filed on June 23, 1992) with the previously consolidated NAACP and De Grandy actions.

---

[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement in No. 92-767, *United States* v. *Florida*. (The district court's judgment (J.S. App. 1a-6a) and opinion (J.S. App. 7a-76a) are also identically paginated in the Appendix to the Jurisdictional Statement in *Johnson* v. *De Grandy*, No. 92-519.) "JA" refers to the Joint Appendix in this Court, "Tr." to the transcript of proceedings in the district court, and "NAACP Ex. 1" to an exhibit introduced into evidence at trial.

Trial began on June 26, 1992 in the consolidated lawsuits.[2] Counsel for the United States, in opening statement, told the court that an additional Hispanic Senate seat in Dade County "will not diminish black voting strength in Dade County. . . ." Vol. I Tr. 47. Counsel for the NAACP replied:

> However, I would note to the Court that the Justice Department's representative has said here today that what they seek to accomplish on behalf of Hispanics in Dade County can be done without harming the interest of blacks in Dade County. Frankly, the NAACP remains unconvinced about that. We take that representation with a grain of salt, and we would like the Court to be very cognizant of that and pay close attention. . . . [Vol. I Tr. 66.]

The evidence at trial demonstrated that (1) African-Americans in Dade County and surrounding areas are politically cohesive, unite in large numbers behind candidates of their choice, and prefer African-American candidates in elections against candidates of other races;[3] (2) racially polarized voting in Dade County severely handicaps the ability of African-American voters to elect candidates of their choice;[4] and (3) African-Americans are sufficiently numerous and geographically compact to permit the drawing of three African-American voting age

---

[2] The congressional redistricting issues had previously been resolved, *De Grandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992), and are not now before this Court. However, the district court took judicial notice of the evidence in the congressional redistricting case.

[3] Testimony of Dr. Allan J. Lichtman, JA 369; affidavit of Dr. Dario V. Moreno, JA 177, 182, 184.

[4] Affidavit of Dr. Moreno, JA 186, 191-93; testimony of Dr. Moreno, Vol. II Tr. 82 ("there is a high degree of tension in Dade County between the Afro-American population and the Hispanic population"); testimony of Dr. Lichtman, JA 369 and Vol. III Tr. 36 (instances where white and Hispanic voters in Dade County combined to defeat African-American candidates).

population (VAP) districts in south Florida.[5] Indeed, the so-called Burke-Wallace plan, which was adopted by the Florida House of Representatives but not by the Senate,[6] would have created three such African-American majority Senate districts.

Based on the evidence, the district court made factual findings—not challenged in these consolidated appeals. Pursuant to this Court's opinion in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the district court found that (1) the Hispanics and African-Americans were each "politically cohesive among themselves but were not at all cohesive—and were often at odds—in relation to each other," and "[a]ll of the evidence indicated that Dade County's African-American community is cohesive," J.S. App. 44a, 47a; (2) "[t]here was a substantial amount of testimony . . . that voting in Dade County is racially polarized" and that "African-Americans have also been the victims of block [sic] voting." J.S. App. 49a, 52a; and (3) "[t]he NAACP has established that three geo-

[5] Testimony of John Guthrie, Staff Director of Senate Committee on Reapportionment, Vol. IV Tr. 201-02; *accord*, NAACP Ex. 1 (Burke-Wallace Plan).

[6] JA 427-28. The Burke-Wallace plan, NAACP Ex. 1, was initially ruled inadmissible in the NAACP's case-in-chief, Vol. III Tr. 123, but was later admitted into evidence. Vol. VI Tr. 188. Once admitted, NAACP Ex. 1 cured the previously expressed concern by NAACP counsel that "we were basically precluded from going forward with our Section 2 case," Vol. III Tr. 193, as was made clear in the NAACP closing argument. JA 473-75.

The use of the term "claim" in the United States' brief, P.5, line 1, requires clarification. The word should be limited to the description of the NAACP allegations in the preceding sentence and could not have been used synonymously with "complaint" or "count of a complaint." The district court's initial ruling was *not* that the NAACP's entire "claim" or complaint was untimely but that a particlular document, NAACP Ex. 1, which was a constituent part of the "claim" or complaint, was untimely and would not be admitted into evidence. Presentation of oral evidence on this point was initially restricted on similar grounds. In any event, the evidentiary restriction was later reversed. Vol. VI Tr. 188.

graphically compact districts can be drawn in which African-Americans in Dade County would constitute a majority of the VAP and have the potential to elect candidates of their choice. The NAACP submitted a plan which creates three African-American VAP districts." J.S. App. 59a. The district court also made findings about the history of discrimination against African-Americans in Florida and Hispanics in Dade County. J.S. App. 53a-54a.

There was limited evidence before the district court about the effect of an additional Hispanic majority Senate district on African-Americans in Dade County, and the little evidence there was came during testimony in the liability phase of the trial. Cross-examination of expert witness Ronald Weber established that the Dade County Senate districts were "packed" with African-Americans (Vol. VI Tr. 135), that the three African-American districts in NAACP Ex. 1 would definitely elect African-Americans in districts 37 and 39 and possibly in 35 (Vol. VI Tr. 142, 163), and that a fourth Hispanic Senate seat in Dade County would "decimate" the opportunity for African-Americans in Dade County to elect representatives of their choice (Vol. VI Tr. 68). Two NAACP witnesses also testified that to draw four Hispanic districts wholly within Dade County would prevent the drawing of two African-American districts wholly within Dade County (Vol. III Tr. 110, 143).

2. Senate District 40 in the state reapportionment plan was "designed to hold together politically cohesive African-American communities in South Dade County."[7] At the time it was drawn, Daryl Jones, an incumbent African-American member of the Florida House of Representatives, had announced his candidacy for Senate District 40. Representative Jones was elected to the House from a

[7] Government Ex. 14 at 3; Vol. I Tr. 39-40 (Florida Senate Response to U.S. Department of Justice Request for Further Explanation of SJR-2G).

district which had 26.7 percent African-American voting age population.[8] Senate District 40 is 34.5 percent African-American VAP and included much of Representative Jones' House District.[9]

Testimony at trial forecast that District 40 would elect an African-American Senator.[10] Based on the evidence, the district court found as a fact that Senate District 40 "performs as a third African-American district without adversely affecting Hispanics in the Dade County area." J.S. App. 66a.

In the November 1992 elections, Senate District 40, which the district court termed "a strong African-American influence district," J.S. App. 64a, did, in fact, elect an African-American Senator, Daryl Jones.[11]

SUMMARY OF ARGUMENT

In this consolidated appeal of three separate lawsuits, not a single party challenges the district court's findings of a Section 2 violation in the Senate districts in Dade County with respect to African-American plaintiffs. These issues are not before the Court and, in any event, the findings were not clearly erroneous.

---

[8] *Id.*

[9] *Id.*

[10] Testimony of Leon Russell, first vice president of the Florida State Conference of NAACP Branches. Vol. III Tr. 136 (Daryl Jones, an African-American, will win Senate District 40); testimony of Representative Willie Logan, Chairman of the Florida Caucus of Black State Legislators, Vol. III Tr. 147.

[11] Although the November 1992 election results occurred post-trial and therefore are not in the trial record, this Court can take judicial notice of the certified copy of relevant pages from *Elections 1992; State of Florida Official General Election Returns: Nov. 3, 1992*, Fla. Dept. of State, Div. of Elections (hereinafter "1992 Official General Election Returns") which is attached as an Appendix to this brief. *Brown* v. *Piper*, 91 U.S. 37, 42 (1875) (judicial notice taken of the election of senators).

Failure to conduct a remedy hearing was error. The limited evidence of remedy at the liability trial was not sufficient to permit the court below to throw up its hands and declare that no remedy was possible. If, after a full remedial hearing, it appears that complete relief can be only accorded to one minority group, it should be that minority group which the court below finds to be the most historically disadvantaged in the affected political unit, here African-Americans in the Dade County area.

The proceedings in the Florida Supreme Court were expressly "without prejudice" to later assertion of Voting Rights Act claims that the state court's limited review neither resolved nor provided opportunity to resolve. Questions about "influence" districts, citizen voting age population (CVAP) and sustained electoral success necessary to prove a defense of proportional representation under *Thornburg v. Gingles*, 478 U.S. 30 (1986), are not necessary to the decision by the Court and, if reached, do not in any event affect the liability determination in favor of African-American plaintiffs arising out of the Senate districts in Dade County.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND LIABILITY UNDER SECTION 2 OF THE VOTING RIGHTS ACT IN FAVOR OF AFRICAN-AMERICAN PLAINTIFFS.

Although there was initial confusion in the district court about its liability holding, this confusion was dispelled by the court's opinion. J.S. App. 72a. As clarified, the district court found violations of Section 2 of the Voting Rights Act with respect to the Senate districts in Dade County, but on the record before it declined to order a remedy.

As to the determination of liability to African-American plaintiffs under Section 2 of the Voting Rights Act, the court below was clearly correct and amply supported by

the record.[12] None of the consolidated appeals before this Court challenges those findings of fact or that conclusion of law.

To the extent that several *amici*[13] contend that proof of the three threshold *Gingles* factors does not conclusively establish a Section 2 violation, this argument misstates the district court's holding "that the plaintiffs have satisfied each of the three elements *Gingles* requires *and* that when considered together with the Senate factors, the 'totality of circumstances' show that with respect to Florida's Senate plan, Hispanic and African-American vote dilution exists in Dade County in violation of § 2 of the Voting Rights Act." J.S. App. 30a (emphasis supplied). Even more to the point, *amici* may not raise questions not presented by the parties. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.1 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 532 n.13 (1979). Since none of the parties has challenged the findings of Section 2 violations with respect to vote dilution of African-Americans in Senate districts, the *amici* may not do so.[14]

There was initial confusion below about the proper interplay of liability and remedy in the context of multiple—and perhaps competing—Section 2 claims in a consolidated lawsuit. Ultimately, the district court got it right—a plaintiff does not carry the burden in its liability case to prove the efficacy of any particular remedy. Nothing in the language of the Voting Rights Act of 1965 as amended,[15] the Senate report explaining the 1982 amend-

[12] *See* the United States' brief, at 6-7.

[13] Brief *amicus curiae* of Anti-Defamation League of B'Nai B'rith at 10 *et seq.*; Brief *amici curiae* of the American Jewish Congress *et al.* at 41.

[14] Although the brief of the American Jewish Congress does not list a "Question Presented," it is apparent from topic heading III B and its entire argument that it is directly attacking this Court's plurality opinion in *Thornburg* v. *Gingles*, *supra*.

[15] 42 U.S.C. §§ 1973 *et seq.*

ments,[16] or this Court's decision in *Thornburg* v. *Gingles*, *supra*, imposes that additional burden on plaintiffs—or even contemplates it.

Such a result would be bad law and worse policy. If plaintiffs were required to prove remedy as an additional element of the liability case, it would contravene in large part this Court's prior holdings that the State must be given the first opportunity to submit a plan that remedies a Section 2 violation.[17] Sound considerations of the proper boundaries between legislative and judicial branches vest in the legislature the duty to choose among competing political values in drawing boundaries not otherwise required to redress legal violations. Moreover, as a practical matter, it is usually the State in the first instance that has access to superior data and computer technology to draw political boundaries to redress legal violations.

Accordingly, the liability determination should be affirmed.

II. REMEDIAL PROCEEDINGS WERE NECESSARY.

The district court did not hold a remedial hearing on the Senate districts.[18] Instead, it relied upon some of the evidence that had been introduced at the liability stage in order to support its conclusion in regard to remedy. The error here is manifest. If courts could dispense at will with remedial proceedings, particularly without advance notice to the parties, the liability phases of these already-complicated redistricting proceedings would be turned into a jumble of confusing evidence, as parties tried to make certain that they anticipated and dealt with every possible remedy in the event the court decided to forego the second stage.

[16] S.Rep. No. 417, 97th Cong., 2d Sess. (1982).

[17] *Connor* v. *Finch*, 431 U.S. 407, 414-15 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978) (opinion of White, J.).

[18] It held a short, same-day non-evidentiary proceeding on the House remedy.

There are valid reasons for a two-stage approach to redistricting. First, neither the courts nor the parties should have to spend valuable resources dealing with remedies unless it is clear—and the courts have already held—that there is liability. This necessarily means a two-stage process.

Second, although new evidence will undoubtedly be introduced, the parties at the remedial proceeding should also be able to build upon, explain or rebut the evidence relating to remedy tangentially introduced at the liability stage. This is not possible if the liability stage is on-going at the time the remedial evidence is submitted.

Third, holding a separate remedial hearing will give the parties time to develop and present various workable plans that the courts can then consider in light of the entire record. The problems inherent in the alternative approach are apparent from the instant record: during the liability stage, after a very short time to think about the matter, the NAACP representative was not able to construct a plan that he thought would accommodate both the Hispanic and African-American interests. This dilemma may have been subsequently solved, however, after more reflection and computer work-time could be devoted to the task. All of this confusion could easily have been avoided if the district court had made clear from the outset that remedies would not be addressed until after liability had been either proved or disproved.

The district court's remedial conclusion, although defensible if in the expedited context of a motion for preliminary injunction, is particularly suspect here where the court below denied a same-day motion for reconsideration that presented it with the very 4-3 plan that the court had found was not possible. JA 482. In truth, the 4-3 plan in all likelihood would have been proved possible and in any event should have been the subject of remedial proceedings.

In closing argument, counsel for the NAACP suggested the appropriate remedial course for the district court to follow:

> Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. *If it is possible to accomplish that solution,* the NAACP supports that solution. NAACP does not seek to come into this Court and advance a claim on behalf of its members at the expense of another minority group.
>
> * * * *
>
> On the other hand, what happens if this Court ultimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And I submit to Your Honor that the record is clear that that is African-Americans.
>
> From the Congressional trial this Court has before it Census data that is replete with evidence that in South Florida, in areas of jobs and housing and education and health care, blacks are very, very seriously disadvantaged and comparably more disadvantaged than are Hispanic groups. The record also is replete with evidence that the Hispanic population in South Florida is growing much more rapidly than the black population of South Florida, thereby making it ever more difficult for blacks to elect their candidates of choice. [JA 475-76 (emphasis supplied).]

This is still the NAACP position: if a plan can be devised, as here, where both minority groups can be accommodated, that should be done; but in a situation where the two plans really are mutually exclusive, the advantage should be given to the historically most disadvantaged of the two groups, which in this case was the

African-American group. This approach provides a bright-line test that the NAACP respectfully commends to this Court as preferable to the district court's conclusion of violations for which there is no remedy.

The NAACP is *not* seeking in this Court an outcome as appellee that "would result in greater relief than was awarded . . . by the District Court." *Barry* v. *Varchi*, 443 U.S. 55, 69 n.1 (1979). As explained by the court below, J.S. App. 65a, the State plan created, in effect, a third African-American district in Senate District 40 that subsequently elected African-American Daryl Jones in November 1992.

In any event, while this Court certainly can provide guidance to the district court on the subject of mutually-exclusive remedies, we submit that the entire subject of remedies should be decided in the first instance by the district court at a remedial hearing after all parties are given an opportunity to appear and be heard.

III. THIS COURT NEED NOT REACH ANY HYPOTHETICAL QUESTION ABOUT "INFLUENCE" DISTRICTS.

As noted above, in November 1992 the voters of Florida Senate District 40 elected Daryl Jones, an African-American, to the State Senate.[19] Florida Senate District 40 is thus more than an "influence" district. The court below correctly found as a fact that African-Americans could elect a candidate of their choice in that district. It is a district today represented by an African-American Senator.

In light of this electoral development, the NAACP respectfully suggests that this case is not an appropriate vehicle for abstract speculation about "influence" districts. The entire discussion by the United States at pages 16-18

[19] Appendix at 3a.

of its brief, therefore, need not be addressed.[20] Here, as in *Voinovich*,[21] *Growe* [22] and *Gingles*,[23] hypothetical questions about influence districts can be preserved for another day and a proper case where they are directly presented.

IV. THE DISTRICT COURT PROPERLY DEFERRED JURISDICTION UNDER *GROWE* v. *EMISON* UNTIL STATE PROCEEDINGS WERE CONCLUDED.

Anticipating this Court's decision in *Growe* v. *Emison*, *supra*, the district court stayed this action until the conclusion of all state proceedings. The district court was clearly correct.

Any suggestion that the NAACP and others might be barred by *res judicata* or collateral estoppel by virtue of the Florida Supreme Court's proceedings misconstrues the limited review by that court. There was no full and fair opportunity to litigate the NAACP's Voting Rights Act claims in the two proceedings there. *Allen* v. *McCurry*, 449 U.S. 90 (1980). Indeed, as outlined below, the Florida Supreme Court said so expressly.

The proceedings in the Florida Supreme Court were original actions, by the state attorney general, pursuant to article III, section 16(c) of the Florida Constitution. That section mandates a judgment by the Florida Supreme Court within thirty days regarding the validity of

[20] The NAACP also agrees with the United States' earlier brief in opposition to motion to dismiss or affirm, No. 92-767 at pp. 9-10, that "[t]he difficult questions concerning the definition and legal status of influence districts in Section 2 litigation were not fully developed in this litigation . . ." and with its suggestion that "[t]he need to address those questions can be obviated by remanding the case to the district court for appropriate remedial proceedings." *Id.* at 10.

[21] *Voinovich* v. *Quilter*, 113 S.Ct. 1149, 1157-58 (1993).

[22] *Growe* v. *Emison*, 113 S.Ct. 1075, 1084 n.5 (1993).

[23] *Gingles*, 478 U.S. at 46-47 n.12.

a reapportionment plan. In its May 13, 1992 decision, the Florida Supreme Court acknowledged:

> At the same time, it is impossible for us to conduct the complete factual analysis contemplated by the Voting Rights Act, as interpreted in *Thornburg* v. *Gingles,* within the time constraints of article III, section 16(c). . . . Any decision which requires consideration of facts that are unavailable in our analysis will have to be resolved in subsequent litigation, as explained later in this opinion. [*In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 597 So. 2d 276, 282 (Fla. 1992).]

The court's holding was specifically "without prejudice to the right of any protestor to question the validity of the plan by filing a petition in this Court alleging how the plan violates the Voting Rights Act." *Id.* at 285-86. This "without prejudice" language means that there was no adjudication on the merits of the Voting Rights Act issues and thus no *res judicata* effect, as this Court has recognized. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990). The NAACP chose to litigate in federal court, which had concurrent jurisdiction. J.S. App. 16a.

Subsequently, when the United States Department of Justice did not preclear Florida's reapportionment under Section 5 of the Voting Rights Act and the Florida legislature reached impasse, the Florida Supreme Court, pursuant to the Florida Constitution, adopted a revised Florida reapportionment plan that resolved the Section 5 objections. The limited nature of the second Florida Supreme Court proceeding was emphasized by its Chief Justice, who stressed that "this Court's review in the present proceeding is limited in scope to DOJ's section 5 preclearance inquiry. . . ." *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992,* 601 So. 2d 543, 548 (1992) (Shaw, C.J., specially concurring).

Neither *res judicata* nor collateral estoppel is therefore applicable here.

V. PROPORTIONAL REPRESENTATION IS NOT AN ABSOLUTE DEFENSE.

Proportional representation is neither an absolute floor nor an absolute ceiling under Section 2 of the Voting Rights Act. The Act itself expressly disclaims that proportional representation is any type of floor for equal political opportunity for minorities. 42 U.S.C. § 1973(b). Neither is proportional representation, without evidence of sustained electoral success, a ceiling on equal political opportunity. This Court so held in *Thornburg* v. *Gingles,* 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in judgment) ("I agree with Justice Brennan that *consistent and sustained success* by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation") (emphasis supplied).

The statutory test under Section 2(b) requires examination of the "totality of the circumstances." As this Court stated in *Gingles*:

> Section 2(b) provides that "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." 42 U.S.C. § 1973(b). The Senate Committee Report also identifies the extent to which minority candidates have succeeded as a pertinent factor. S. Rep. at 29. However, the Senate Report expressly states that "the election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the black vote,'" noting that if it did, "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate." *Id.*, at 29, n. 115 [citations omitted]. The Senate Committee decided, instead, to "'require an independent consideration of the record.'" S.Rep. 29, n. 115. The Senate Report also

> emphasizes that the question whether "the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.*, at 30 (footnote omitted). Thus, the language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim. [478 U.S. at 75.]

Applying the "totality of circumstances" test, this Court in *Gingles* held that *sustained* electoral success in *the last six elections* that resulted in proportional representation of African-American residents in House District 23 was a successful defense negating any allegation of unequal opportunity to elect representatives of choice by African-Americans. *Id.* at 77. This Court rejected the contention of appellants "that if a racial minority gains proportional or nearly proportional representation *in a single election*, that fact alone precludes, as a matter of law, finding a § 2 violation." *Id.* at 75 (emphasis supplied).

Similarly here, in the absence of a showing of sustained electoral success, proportional representation is but one factor in the totality of circumstances to be taken into account. The court below considered the evidence, gave it proper weight and committed no error.[24]

Since proportional representation is not an absolute defense but only one of several factors in the "totality of circumstances", issues as to its measurement (*i.e.*, total population, VAP or CVAP) take on less importance in this case and may well vary from case to case depending on local circumstances. The measurement issue was left open by this Court in *Growe* v. *Emison*, 113 S.Ct. at 1083 n.4.

---

[24] The court considered evidence both statewide and with respect to the Dade County area. Both are part of the "totality of circumstances"; House appellants unduly emphasize County statistics alone. With respect to African-Americans, the court below made extensive statewide findings about past discrimination in Florida against African-Americans. *See, e.g.*, J.S. App. 53a-54a.

In this case, the district court made detailed findings of fact about the use of VAP,[25] the need for a Hispanic supermajority VAP to take into account lower citizen and registration rates,[26] and the use of a lower majority VAP for African-Americans reflecting recent increases in African-American turnout and voter registration.[27] The court, noting the unavailability of CVAP data, heard testimony of estimates of noncitizenship among Hispanics, found certain estimates to be unreliable,[28] and relied instead on an analysis of past election results by Dr. Lichtman to estimate noncitizen rates.[29]

In short, the district court did precisely what this Court, in *Gingles*, indicated had to be done. It made careful factual findings about the impact of non-citizenship. There is no need for this Court to reach, much less reverse, those findings.

---

[25] J.S. App. 31a *et seq.*

[26] J.S. App. 32a *et seq.*

[27] J.A. App. 39a-40a.

[28] J.S. App. 74a (Vinson, J., concurring).

[29] J.S. App. 75a (Vinson, J., concurring).

CONCLUSION

The NAACP respectfully submits, for the reasons set forth above, that the liability findings of the district court should be affirmed, the permanent remedial plan should be vacated and remanded for a full evidentiary hearing, and this Court should not reach or decide hypothetical issues about influence districts and CVAP.

Respectfully submitted,

DENNIS COURTLAND HAYES
WILLIE ABRAMS
NAACP SPECIAL CONTRIBUTION FUND
4805 Mount Hope Drive
Baltimore, Maryland 21215
(410) 358-8900

HARRY L. LAMB, JR.
PERRY & LAMB, P.A.
605 E. Robinson Street
Orlando, Florida 32801
(407) 422-5758

E. BARRETT PRETTYMAN, JR.
JOHN C. KEENEY, JR.
(Counsel of Record)
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5600

CHARLES G. BURR
442 W. Kennedy Boulevard
Suite 300
Tampa, Florida 33606
(813) 253-2010

Counsel for Appellee
Florida State Conference of NAACP Branches

APPENDIX

APPENDIX

STATE OF FLORIDA

DEPARTMENT OF STATE

Division of Elections

I, Jim Smith, Secretary of State of the State of Florida, do hereby certify that the attached are true and correct copies of the 1992 primary and general election results for States Senate District 40, as shown by the records of this office.

[SEAL]

Given under my hand and the Great Seal of the State of Florida, at Tallahassee, the Capital, this the 12th day of May A.D., 1993

/s/ Jim Smith
JIM SMITH
Secretary of State

Democratic September 1 & 8, 1992, Primary Election (Con't)

State Senate

District 40

County	Susan Guber	Daryl L. Jones
Dade	2,409	9,510
Monroe	3,628	2,282
Totals	6,037	11,792
Percent	33.9	66.1

Elected Without Opposition (Con't)

Sixteenth Judicial Circuit
Rand Winter

Eighteenth Judicial Circuit
J. R. Russo

Ninteenth Judicial Circuit
Diamond R. Horne

State Senate

Third Senatorial District
Pat Thomas

Fourth Senatorial District
Charles Williams

Eighth Senatorial District
William G. "Bill" Bankhead

Twenty-First Senatorial District
James T. (Jim) Hargrett, Jr.

Twenty-Second Senatorial District
Don Sullivan

Twenty-Fifth Senatorial District
Fred R. Dudley

Twenty-Ninth Senatorial District
Kenneth C. Jenne, II

Thirty-Second Senatorial District
Howard C. Forman

Thirty-Third Senatorial District
Peter M. Weinstein

Thirty-Sixth Senatorial District
William H. Turner

Thirty-Eighth Senatorial District
Ronald (Ron) A. Silver

Thirty-Ninth Senatorial District
Roberto Casas

Fortieth Senatorial District
Daryl L. Jones

State Representative

Third House District
Buzz Ritchie

Fifth House District
Sam Mitchell

Sixth House District
Scott Clemons

Seventh House District
Robert D. Trammell

Eighth House District
Alfred "Al" Lawson, Jr.

Ninth House District
Hurley W. Rudd

Tenth House District
F. Allen Boyd, Jr.

Fourteenth House District
Anthony "Tony" Hill

Fifteenth House District
Willye F. Dennis

Seventeenth House District
James E. "Jim" King, Jr.

Eighteenth House District
Joe Arnall

Ninteenth House District
John Thrasher

Twenty-Third House District
Cynthia Moore Chestnut

Twenty-Fourth House
District
George Albright

Twenty-Seventh House
District
Jimmy Charles

Thirty-Fourth House District
Bob Starks

(8) (9)

Nos. 92-593, 92-767

Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES

JOEL I. KLEIN
Klein, Farr, Smith & Taranto
2445 M Street, N.W., Suite 225
Washington, D.C. 20037
(202) 775-0184

RICHARD E. DORAN
GEORGE L. WAAS
GERALD B. CURINGTON
Assistant Attorneys General
Department of Legal Affairs
Tallahassee, Florida 32399
(904) 488-1573

STEPHEN N. ZACK*
NORMAN C. POWELL
Zack, Hanzman, Ponce, Tucker,
Korge & Gillespie, P.A.
100 S.E. Second Street, Suite 2800
Miami, Florida 33131
(305) 539-8400

KEITH E. HOPE
100 S.E. Second Street, Suite 2100
Miami, Florida 33131
(305) 358-4410

* Counsel of Record

BEST AVAILABLE COPY

A3 PP

QUESTIONS PRESENTED

1. Whether a single-member district reapportionment plan that provides minorities in the challenged area with voting control over districts at a level that is directly proportional to their percentage of the population in the area (and substantially in excess of their percentage of eligible voters) violates Section 2 of the Voting Rights Act.

2. Whether a reapportionment plan that provides at least proportional representation to two minority groups and also, given existing residential patterns, most fairly balances the "competing interests" of those groups violates Section 2 of the Voting Rights Act.

TABLE OF CONTENTS

STATEMENT 1

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. THE FLORIDA SENATE PLAN PROVIDES HISPANICS IN DADE COUNTY THE SAME OPPORTUNITY AS IT PROVIDES OTHER VOTERS TO ELECT REPRESENTATIVES OF THEIR CHOICE 16

A. A Plan That Provides Protected Minorities With Proportional Representation Cannot Violate Section 2 In A Single-Member District Case, Even If The Three *Gingles* Preconditions Are Present 17

B. Appellants' Statewide Theory Of Proportionality, Raised For The First Time On This Appeal, Is Legally Unsound And Factually Nonmeritorious 22

II. THE DISTRICT COURT'S FACTUAL FINDING THAT THE FLORIDA SENATE PLAN MOST FAIRLY BALANCES THE COMPETING INTERESTS OF AFRICAN-AMERICAN AND HISPANIC VOTERS ALSO DEMONSTRATES THAT THE PLAN DOES NOT VIOLATE THE VOTING RIGHTS ACT 32

CONCLUSION 37

TABLE OF AUTHORITIES

CASES:

Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3771 (U.S. May 17, 1993) 21

Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986) 30

Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989) 31

California v. Rooney, 483 U.S. 307 (1987) 13

Davis v. Bandemer, 478 U.S. 109 (1986) 28

Eakin v. Continental Illinois Nat. Bank & Tr. Co., 875 F.2d 114 (7th Cir. 1989) 13

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) 31

Growe v. Emison, 113 S. Ct. 1075 (1993) 19

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 597 So.2d 276 (Fla. 1992) 6-7

In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992, 601 So.2d 543 (Fla. 1992) 6

McDaniel v. Sanchez, 452 U.S. 130 (1981) 11

McGhee v. Granville County, 860 F.2d 110 (4th Cir. 1988) 27-28

McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) 27-28, 31

Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992), *sum. aff'd sub nom., African American Voting Rights Legal Defense Fund, Inc. v, Blunt*, 113 S. Ct. 1809 (1993) . . 21

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) . 31

Scott v. Germano, 381 U.S. 407 (1965) 37

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . . . *passim*

United States v. Mendenhall, 446 U.S. 544 (1980) 23

Voinovich v. Quilter, 113 S. Ct. 1149 (1993) . . . . . *passim*

Wyche v. Madison Parish Police Jury, 635 F.2d 1151 (5th Cir. 1981) 30

Youakim v. Miller, 425 U.S. 231 (1976) 23

STATUTES:

28 U.S.C. § 2284 7

Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.*:

Section 2, 42 U.S.C. § 1973 . . . . . *passim*

Section 5, 42 U.S.C. § 1973c 6

MISCELLANEOUS:

Florida Constitution, Art. III, § 16(a) 2-3

Florida Constitution, Art. III, § 16(c) 6

Florida Senate Joint Resolution 2-G 4-5

S. Rep. No. 97-417, 97th Cong., 2d Sess. 196-201 & 204-213 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177. 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 92-593, 92-767

MIGUEL DE GRANDY, *et al.*,

v. *Appellants,*

BOLLEY JOHNSON, *et al.*,

Appellees.

UNITED STATES OF AMERICA,

v. *Appellant,*

STATE OF FLORIDA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES

STATEMENT

These appeals, along with a consolidated appeal in No. 92-519, *Johnson v. De Grandy*, involve a challenge to the reapportionment plan adopted by the State of Florida after the 1990 federal decennial census. In the district court, a group of Hispanic plaintiffs, referred to here as the "De Grandy" appellants, and the United States, which generally supported the De Grandy effort, failed in their challenge under Section

2 of the Voting Rights Act, 42 U.S.C. § 1973, against the Florida plan for the State Senate, but prevailed against the plan for the State House of Representatives.

1. *The Reapportionment Process*. Pursuant to the Florida Constitution, Art. III, § 16(a), the legislature is required to develop a reapportionment plan, based on the decennial federal census, to govern House and Senate elections. In anticipation of the 1990 census, and cognizant of the large population changes in Florida during the 1980's, the legislature began preparing for this assignment in 1987. The House and the Senate hired expert technical staff and provided them with state-of-the-art computer systems. Both chambers appointed Committees on Reapportionment to aid in developing legislative plans, and both committees included African-American and Hispanic members in key decision-making positions. Testimony of Representative Miguel De Grandy, Tr. IV, 42-45; Testimony of Representative Willie Logan, Tr. VII, 73-77; Testimony of Leon Russell, Vice President of the State Conference of the NAACP, Tr. III, 107-108, J.A. 425-426. The House and Senate also cohosted 32 public hearings throughout the State and two statewide teleconferences. The purpose of the hearings and teleconferences was to ensure increased public awareness about reapportionment and to provide the legislature with public input prior to the adoption of reapportionment plans.

According to 1990 census data, Florida's total population increased from 9,746,324 in 1980 to 12,937,926 in 1990.[1] In

[1] Bureau of the Census, Pub. PC80-1-B11, 1980 Census of Population (Florida) 26 (Aug. 1982); Bureau of the Census, Pub. CN:11271491053, 1990 Census of Population and Housing (Florida) 1 (Jan. 1991).

1990, there were 9,475,326 whites, which amounted to 73% of the State's total population; 1,701,103 African-Americans (13%); 1,574,143 Hispanics (12%); and 187,354 others (1%). *Id.*[2]

Dade County, which is the part of the Senate reapportionment plan that was challenged below, is Florida's most populous county. During the 1980's, Dade's total population increased by 19 percent, from 1,625,781 to 1,937,094. 1980 Census at 34; 1990 Census at 59. But the County's growth did not keep pace with that of the State as a whole. As a result, in the 1992 reapportionment, Dade lost a Senate seat and is, on a *pro rata* statewide basis, now entitled to six out of a total of forty such seats. *See* Testimony of Miguel De Grandy, Tr. II, 155-156.[3]

Hispanics make up 49 percent of Dade County's total population and 50 percent of its voting age population (VAP). *See* 1990 Census at 59. Whites make up 30 percent of the County's total population and 32 percent of the VAP; and

[2] The term "whites" refers to persons classified in Bureau of Census publications as "non-Hispanic whites." Similarly, the term "African-Americans" refers to the persons classified in Census publications as "non-Hispanic blacks." The term "Hispanics" refers to persons of "Hispanic origin (of any race)." The term "others" refers to persons not of Hispanic origin in all other racial categories used by the Census (including "American Indian, Eskimo, and Aleut," "Asian and Pacific Islander," and "Other Races").

[3] The Florida Constitution, Art. III, § 16(a), allows for between 30 and 40 Senate districts. Dade County's population is 1,937,094. The ideal Senate District is made up of 323,448 people, based on a statewide population of 12,937,926 divided into 40 equal-sized districts. Dade is thus numerically entitled to 5.99 Senate districts.

African-Americans make up 19 percent of the total population and 16 percent of the VAP. *See* 1990 Census at 59; *see also* U.S. Exh. 7, 24-25, 61. The number of Hispanics living in Dade County increased by 372,413 people or 64 percent in the period from 1980 to 1990. *See* 1980 Census at 34; 1990 Census at 59. This substantial gain was primarily the result of immigration from Latin American countries. Testimony of Dr. Dario Moreno, Tr. II, 14, 18-19; *see also* U.S. Exh. 37, 5-6. More than half of the County's Hispanic voting age population is non-citizen. Testimony of William DeGrove, Tr. VII, 17-18, J.A. 306-307.[4]

2. *The Reapportionment Plan*. On April 10, 1992, the Florida Legislature, relying on the information obtained from the 1990 Census and from its public hearings, adopted Senate Joint Resolution 2-G (the "Plan") reapportioning the State's forty senatorial districts. The Plan created five Senate districts wholly within Dade County (Districts 34, 36, 37, 38 and 39) and two Senate districts (Districts 32 and 40) that are

[4] While not available to the appellees at the time of trial, official United States Census Bureau data from 1990 indicate that 53 percent of Dade County's voting age Hispanics are non-citizens; and as a result, Hispanics make up only 35.4 percent of the total *citizen* VAP in the County. *See* Memorandum for the Record from Robert Kominski, Chief, Education & Social Stratification Branch, Bureau of the Census, United States Department of Commerce (June 8, 1992) and associated tabulations, J.A. 233-241; 1990 Census at 59; *see also* p. 9, note 12, *infra*. Hispanic citizenship data have now been formally published. *See* Bureau of the Census, Census of Population and Housing, 1990: Summary Tape File 4 (Florida) [machine-readable data files] (1993). Those data indicate that 47 percent of all Hispanics in Dade County are non-citizens; by contrast, only 5 percent of whites and 19 percent of blacks living in Dade County are non-citizens. *Id.*

made up of a part of Dade County and a part of an adjoining county — one to the north and one to the south.[5] Hispanics constitute a majority of the VAP in three of the Senate districts wholly within Dade County; whites constitute a majority in one of the two remaining districts wholly contained within the County as well as in one of the districts partly in the County; and African-Americans constitute a majority in the other district wholly within the County and a controlling plurality in the other district partly within it. U.S. Exh. 7, 24-25.[6]

On April 13, 1992, the Florida Attorney General petitioned the Florida Supreme Court for judicial review of the

[5] The fact that two of these districts extend outside Dade County to a neighboring county is a result of geography and has never been challenged on Section 2 or constitutional grounds. The southernmost county in Florida (directly below Dade) is Monroe County, which has approximately 78,000 people. That county is joined with approximately 246,000 people from south Dade County and downtown Miami to achieve a district that is approximately the same size as the other 39 Senate districts. By the same token, a second district with approximately 76,000 residents in northwest Dade County is completed by including approximately 248,000 persons from adjacent Broward County to the north.

[6] The district court found that, in District 40, "African-Americans can elect a candidate of their choice because of strong minority coalitions between the African-Americans and the Mexican-Americans, as well as white cross-over votes." U.S. App. 65a. (The United States and the De Grandy appellants have both reprinted the judgment and opinion below in appendices to their respective jurisdictional statements. We will cite to the Appendix filed by the United States ("U.S. App.")).

Plan, as provided by the State Constitution.[7] On May 13, 1992, the Court approved the Plan. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 597 So.2d 276 (Fla. 1992). The Florida Attorney General then submitted the Plan to the United States Department of Justice for preclearance review pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[8] On June 16, 1992, the United States issued its preclearance decision, stating that its sole objection was to the Plan's Senate districts because of a problem it perceived in the Hillsborough County (Tampa) area. U.S. Exh. 16. In response, on June 22, 1992, the Florida Supreme Court amended the Plan to remedy this objection. *In re Constitutionality of Senate Joint Resolution 2G, Special Apportionment Session 1992*, 601 So.2d 543 (Fla. 1992).

The De Grandy appellants fully participated in the proceedings before the Florida Supreme Court, arguing that the Plan violated Section 2 of the Voting Rights Act because it failed to create additional majority-minority districts. 597

---

[7] Art. III, § 16(c), Fla. Const., provides:

> (c) JUDICIAL REVIEW OF APPORTIONMENT. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general shall petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment. The supreme court, in accordance with its rules, shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment.

[8] Because of a previous failure to have bilingual ballots, five Florida counties, but not Dade, are subject to the preclearance requirements of Section 5.

So.2d at 284. Concentrating on Dade County's Senate districts, the appellants contended that a fourth majority Hispanic Senate district should have been created. *Id.* The Florida Supreme Court rejected this contention, finding that the Plan did not discriminate against minorities. *Id.* at 285. The Court also found the Plan to be a material improvement over the 1982 plan because it provides minorities with substantial opportunities to influence elections and to elect representatives of their choice. *Id.* The Court's ruling was without prejudice to any interested party's right to file a subsequent petition before it alleging a violation of Section 2 of the Voting Rights Act. *Id.* The De Grandy appellants declined to file such a petition, choosing instead to seek leave to amend the complaint that they had previously filed in federal court. R. 448.[9]

3. *The Federal Court Proceedings.* In their amended complaint, the De Grandy appellants raised the same Section 2 claim against the Senate Plan they had argued in the Florida Supreme Court, again seeking a fourth majority Hispanic district in the Dade County area. R. 448. The district court, which had been designated as a three-judge court pursuant to 28 U.S.C. § 2284, granted the motion to amend on June 22, 1992. R. 460. The next day, the United States filed a complaint alleging the same Section 2 violation

---

[9] The De Grandy appellants had filed a complaint in the district court for the Northern District of Florida on January 14, 1992. R. 1. The complaint alleged, among other things, legislative impasse and malapportionment (under the 1982 plan). The complaint also prayed for the district court's intervention to redraw Florida's legislative and congressional districts. The subsequent passage, approval, and modification of the Plan mooted this initial claim.

raised in the De Grandy appellants' amended complaint with regard to Dade County's Senate districts. J.A. 73-80. On June 26, 1992, the district court consolidated the complaints for trial. Tr. I, 8.[10]

The trial began on the same day the court entered its consolidation order and lasted five days, until July 1, 1992. Purporting to rely on the decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), plaintiffs attempted to prove that the Senate Plan violated Section 2 by demonstrating that it failed to *maximize* Hispanic voting strength in Dade County. Testimony of Daryl Reaves, Tr. II, 179, 184; Testimony of Allan Lichtman, Tr. III, 28-31, J.A. 366-368; Testimony of Miguel De Grandy, Tr. II, 153-154. The De Grandy appellants introduced an alternative plan containing an additional majority Hispanic VAP district, as did two of the intervenors.[11] At the close of the plaintiff's case, the Senate defendants moved for a directed verdict. Tr. III, 188. The

[10] Other plaintiff intervenors presented alternative plans to the district court and participated at the trial, including: (1) The Florida State Conference of NAACP Branches, which filed a motion to consolidate and a complaint on April 7, 1992, alleging legislative impasse and malapportionment of the then-existing legislative and congressional districts with respect to African-Americans. The district court granted the motion on April 9, 1992; (2) Gwen Humphrey, who along with various other named African-Americans, filed a motion to intervene as plaintiffs on April 7, 1992. R. 79. The district court granted the motion to consolidate the same day. R. 86; and (3) Florida House of Representatives members Daryl Reaves, Corrine Brown, and James T. Hargrett, who filed a motion to intervene as plaintiffs on April 10, 1992. R. 112. On April 13, 1992, the district court granted the motion. R. 116.

[11] Humphrey, *et. al.*, and Hargrett, Brown, and Reaves submitted virtually identical alternative plans. R. 148, R. 156.

NAACP joined in this motion. Tr. III, 194. The district court denied the motions. Tr. III, 216.

In response to the plaintiffs' claim that the Senate Plan violated Section 2, the Senate defendants presented four arguments and supporting evidence. First, they claimed that the Voting Rights Act does not require maximization of minority voting strength. Tr. VIII, 45-46; *see also* Tr. VIII, 51. Second, they argued that, even disregarding the question of citizenship, the Plan provided Hispanics the opportunity to elect candidates of their choice at levels proportionate to their Dade County population. *Id.; see also* Testimony of Ron Weber, Tr. VI, 48, J.A. 457-458. Third, they contended that Hispanics, in fact, were afforded greater than a proportional share of Dade County's senatorial districts in view of testimony that more than half of the voting age Hispanics in Dade County were not citizens and thus only about one-third of the total citizen voting age population in the County was Hispanic. Testimony of William DeGrove, Tr. VII, 20, J.A. 308; Testimony of Ron Weber, Tr. VI, 53.[12] Finally, the

[12] This testimony was based on statistical analyses of 1990 census data. At the time of the trial, census data were available for the voting age populations of Hispanics and citizens separately, but not for Hispanic citizens. *See* Bureau of the Census, Census of Population and Housing, 1990: Summary Tape File 3 (Florida) [machine-readable data files] (1991). Subsequent to the trial, appellees obtained the actual census count of the voting age population of Hispanic citizens in Dade County, which is 350,499. J.A. 236. Now that the census count of Hispanic citizens is known, the actual percentages can be calculated and compared with the trial testimony: 53 percent of Dade County's 738,938 voting age Hispanics are non-citizens, and Hispanics make up 35 percent of the citizen voting age population in Dade County (the total citizen VAP in Dade is 987,346). *See* p. 4, note 4, *supra; see also* 1990 Census at 59.

Senate defendants and the NAACP presented evidence to show that the creation of an additional Hispanic district in Dade County would dilute African-American voting strength in that area. Testimony of Ron Weber, Tr. VI, 67, 135-136, J.A. 460, 469-470; *see also* Testimony of Leon Russell, Tr. III, 110, 127, J.A. 427, 439; Testimony of John Guthrie, Tr. IV, 157-186, J.A. 318-329.[13]

4. *The District Court Decision*. On July 1, 1992, the district court announced its decision from the bench, finding that the Senate Plan did not violate Section 2. *See* Tr. VIII, 53, J.A. 477. Consistent with this ruling, the next day the district court entered its final judgment, upholding the Senate Plan. U.S. App. 5a. With respect to appellants' Section 2 claim, the judgment provides that "[t]he state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 *et seq.*)." *Id.* 5a.[14]

---

[13] The Senate defendants also argued that appellants had failed to satisfy the second and third so-called "*Gingles* preconditions" (*see Thornburg v. Gingles*, 478 U.S. 30 (1986)), which require Section 2 plaintiffs to prove that they are unable to elect their preferred candidates because of polarized voting. Tr. VIII, 41-42; Tr. V, 36-38. The Senate defendants presented evidence demonstrating that Hispanics in Dade County have enjoyed sustained success in electing their candidates of choice at a percentage that exceeds their voting strength. Testimony of Ron Weber, Tr. VI, 60-61, 67-68.

[14] The four paragraph judgment provides:

> 1. The State of Florida's state senatorial districts embodied in Senate Joint Resolution 2-G, as modified by the Florida Supreme Court on June 25, 1992 ["1992 Florida Senate Plan"] do not violate Section 5 of the Voting Rights Act of 1965, as amended, (42 U.S.C. § 1973 *et seq.*).
>
> 2. The Court adopts the 1992 Florida Senate Plan as the plan to be utilized in the 1992 Florida Senate elections and in Florida State Senate Elections thereafter.
>
> 3. The state of Florida's state senatorial districts embodied in the 1992 Florida Senate Plan do not violate Section 2 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973 *et seq.*).
>
> 4. The defendants, individually, and their successors, agents, employees, attorneys, and persons acting in concert or in participation with them shall:
>
> (a) conduct state senatorial elections in 1992 in accordance with the 1992 Florida Senate Plan, a map and written description of which is attached to this Judgment;
>
> (b) conduct state senatorial elections in years after 1992 in accordance with the 1992 Florida Senate Plan.

Id. The United States suggests that the judgment was ambiguous because, while it found no liability under Section 2, it ordered the State to adopt its own Senate Plan. U.S.J.S. at 9, n.7. But there was nothing inconsistent about these two features of the judgment. The court's order requiring the State to comply with the Senate Plan was merely formalization of an earlier oral ruling, which was made in order to eliminate the need for further Section 5 preclearance by the Justice Department. U.S. App. 20a; Tr. I, 37. *See McDaniel v. Sanchez*, 452 U.S. 130 (1981).

Although no post-judgment motions for amendment or rehearing were filed by any appellant,[15] the district court issued an opinion fifteen days later (on July 17, 1992), concluding that the Senate Plan violated Section 2 as to both Hispanic and African-American voters, but that neither

[15] After the court's ruling from the bench on July 1, 1992, the De Grandy appellants made an oral motion for reconsideration, which was immediately denied. Tr. VIII, 61, J.A. 482. No written motions for rehearing were filed after the court issued its judgment on July 2, 1992.

violation could be remedied without impairing the interests of the other minority group. The court stated:

> We held in our order imposing the 1992 Florida Senate Plan that the Florida Senate plan does not violate Section 2 of the Voting Rights Act of 1965, as amended. (Doc. 553.) This language should be read as holding that the Florida Senate Plan does not violate Section 2 such that a different remedy must be imposed. In other words, although the Florida Senate Plan violates Section 2 of the Voting Rights Act, it nevertheless is the best remedy to balance the competing minority interests in Dade County and the South Florida area.

U.S. App. 72a.

In support of its new conclusion, the court found that the three *Gingles* preconditions had been satisfied by both minorities. Specifically, the court found that (1) each minority group, viewed independently, is "sufficiently large and geographically compact" to support an additional district in the Dade County area (U.S. App. 30a-42a); (2) each minority is "politically cohesive" within its own group (*id.* at 48a); and (3) each minority has had its candidates defeated by "white bloc voting" (*id.* at 48a-53a). The court also found that both groups had suffered discrimination in areas other than voting. *Id.* at 54a-55a.

The district court went on to determine that the best remedy for these violations was the Florida Senate Plan itself. Based on the record — including the alternative plans submitted by the other parties — the court found "that the creation of a fourth Hispanic VAP supermajority district

would adversely affect African-Americans in South Florida and that the creation of a third [African-American] VAP majority district would adversely affect Hispanics in Dade County." *Id.* at 64a. The court thus concluded that "the Florida Senate Reapportionment plan is the fairest to all ethnic communities in Dade County and the surrounding areas." *Id.* at 66a.[16]

SUMMARY OF ARGUMENT

The district court's judgment correctly holds that the Florida Senate Plan does not violate the rights of Hispanics under Section 2 of the Voting Rights Act. We will defend that judgment on two separate grounds.[17]

1. We rely first on a straightforward numerical analysis. Hispanics make up approximately half of the VAP in Dade County and, under the Florida Plan, they have the undisputed ability to elect representatives of their choice in three of the six Senate districts to which Dade County is entitled. These

---

[16] Judge Vinson joined the court's opinion, but wrote separately to emphasize the points that he considered dispositive. *Id.* at 73a-76a.

[17] Although the district court's subsequent opinion contradicts the clear language of its judgment (*see* pp. 10-12, *supra*), it is axiomatic that this Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987). Where an opinion conflicts with a judgment, the judgment controls. *Eakin v. Continental Illinois Nat. Bank & Tr. Co.*, 875 F.2d 114, 118 (7th Cir. 1989). *See* Appellees' Motion to Dismiss or Affirm at 12-14. Consequently, we did not pursue an appeal from the court's erroneous opinion, but have sought instead to have its judgment affirmed on grounds advanced in the district court. *Ibid.*

numbers conclusively demonstrate that Hispanics have not been accorded "less opportunity than other members of the electorate . . . to elect their preferred representatives." Section 2(b), 42 U.S.C. § 1973. Hispanics are given precisely the same opportunity: half the districts for half the people.

The district court ignored this proportionality argument, holding instead that proof of the three "preconditions" set out in *Thornburg v. Gingles,* 478 U.S. 30 (1986) — geographic compactness, minority cohesion, and white bloc voting — was sufficient to establish a Section 2 violation. That ruling not only flies directly in the face of the statutory language, but also reflects an obvious misapplication of *Gingles*, a multimember district case, to a single-member district case like this one. Under a single-member plan, despite the presence of the *Gingles* preconditions, a protected minority may still be able to elect a proportional share of representatives, or more, depending on how the district lines are drawn. Thus, basing a single-member district violation solely on the *Gingles* preconditions will necessarily result in a maximization rule for minority representation. Such an approach is irreconcilable with the "equal opportunity" mandate of the statute. *Voinovich v. Quilter,* 113 S. Ct. 1149, 1156 (1993).

The United States recognizes this point and thus seeks to defeat our proportionality showing by arguing that it impermissibly fails to take into account all Hispanics living in Florida — even those who reside hundreds of miles *outside* Dade County. That position, aside from not having been raised below, is wrong as a matter of law and, in any event, no help to appellants on the facts of this case. It is wrong because it ignores the *Gingles* requirement of "geographical

compactness" that a plaintiff must establish to prevail in any Section 2 case. Compactness ensures, as the statute requires, that governmental action — and not private residential choice — is the cause of a denial of electoral opportunities to a protected minority. Appellants' "statewide" argument is also unhelpful because, even on that basis, the Florida Senate Plan accords proportional representation. Hispanics account for approximately 7 percent of Florida's eligible voters, thus entitling them to effective voting control over three Senate districts (7% of 40), which is exactly the number they receive under the Senate Plan. The De Grandy appellants' effort to get around this problem, by including non-citizen Hispanics in determining proportionality, is plainly inconsistent with the statute, which is expressly intended to protect the "right of any *citizen* . . . to vote." Section 2(a) (emphasis added).

2. The second reason for affirming the judgment below is that, even when the facts are viewed through the maximization lens employed by the district court in this case, there is no violation here. The district court found that, given existing residential patterns, any effort to create a fourth Hispanic-controlled district would diminish the ability of African-Americans to elect representatives of their choice. U.S. App. 63a. Based on this fact, in turn, the court ruled that the Florida Senate Plan "is the *fairest* to all ethnic communities in Dade County." *Id.* at 66a (emphasis added). That finding compels the conclusion that the Senate Plan complies with Section 2 — it accords proportional representation to two competing minority groups, neither of whose opportunity to elect representatives can be improved without diminishing the opportunity of the other. Contrary to appellants' contentions, the district court's factual finding concerning mutual fairness

is amply supported by the record and there is no basis to remand for an additional hearing on this issue.

ARGUMENT

I. THE FLORIDA SENATE PLAN PROVIDES HISPANICS IN DADE COUNTY THE SAME OPPORTUNITY AS IT PROVIDES OTHER VOTERS TO ELECT REPRESENTATIVES OF THEIR CHOICE

It cannot be disputed that, under the Florida Senate Plan, Hispanics in Dade County have the ability to elect representatives of their choice in precisely the same proportion as their population. This is true no matter how the numbers are viewed. Hispanics comprise half the VAP in Dade County, and they have voting control over three of the six districts to which Dade is numerically entitled. Hispanics comprise 45 percent of the VAP in the seven districts wholly or partially made up of Dade County, and they have voting control over 43 percent of those districts. And Hispanics comprise 54 percent of the VAP in the five districts wholly in Dade County, and they have voting control over 60 percent of those districts. U.S. Exh. 34. Nothing in the district court's opinion or appellants' arguments explains why these basic facts do not defeat the Section 2 claim in this case.[18]

[18] This numerical analysis is based on a comparison of VAP percentages, which, if anything, *overstate* the claims of Hispanics because more than half of the Hispanic VAP is non-citizen and therefore ineligible to vote. If we are correct that a proper comparative analysis under Section 2 would rely on eligible-voter numbers (*see* pp. 30-32, *infra*), then Hispanics receive *more* than proportional representation because they comprise only about one-third of the eligible voters in Dade County, which means that proportionally they would be entitled to control only two Senate districts, instead of the three provided under the State Plan.

A. A Plan That Provides Protected Minorities With Proportional Representation Cannot Violate Section 2 In A Single-Member District Case, Even If The Three *Gingles* Preconditions Are Present

In its opinion, the district court held that proof of the *Gingles* preconditions establishes a Section 2 violation even though the plaintiff minority is given proportional representation within those districts that compose the "geographically compact" area that satisfies the first of these preconditions.[19] That view cannot be squared with the statute or with this Court's precedents interpreting it.

Section 2 prohibits any voting requirement, practice, or procedure that results in "members [of a minority] hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their own choice." The specific claim in vote dilution cases is that the government has impaired a minority group's opportunity to elect representatives of its choice "either 'by the dispersal of the group into districts in which they

[19] In addition to the three preconditions, the only other consideration mentioned by the court to support its liability conclusion is a finding concerning various forms of discrimination in areas other than voting. U.S. App. 53a-54a. As the court's discussion on this point makes clear, this finding will be available in virtually every voting rights case.

constitute an ineffective minority of voters or from the concentration of [the group] into districts where they constitute an excessive majority.' " *Voinovich,* 113 S. Ct. at 1155 (quoting *Gingles,* 478 U.S. at 46, n.11). Such dilution can occur in either of two kinds of districting structures: (1) in a multimember election district system where the white majority is consistently able to vote together to defeat the minority's preferred candidates; or (2) in a single-member district system where the minority group is fragmented among districts or overly concentrated within them.

In *Gingles,* a multimember district case, the Court held that a plaintiff had to prove three essential "preconditions" to liability: *first,* "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; *second,* that it is "politically cohesive"; and *third,* "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51 (footnotes omitted). Once these showings are made, the trial court must make an overall factual determination, based on the "totality of circumstances," whether the minority group has been denied the opportunity "to participate equally in the political process and to elect candidates of their choice." *Id.* at 80.[20]

---

[20] In addition to the three preconditions, the other factors subsumed in the "totality-of-circumstances" inquiry include such matters as historical voting practices, the effects of discriminatory practices in areas other than voting, and whether campaigns are characterized by racial appeals. 478 U.S. at 36-37. These factors were contained in the Senate Report on the bill that became the current version of Section 2. S. Rep. No. 97-417, 97th Cong., 2d Sess. 196-201 & 204-213 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177.

The three *Gingles* preconditions, as the Court held earlier this year, must also be established in a vote dilution case involving a single-member district plan. *See Voinovich; Growe v. Emison,* 113 S. Ct. 1075 (1993). But it does not follow, as the court below erroneously believed, that the legal analysis for single-member and multimember district claims is identical. *See Voinovich* at 1157 ("The *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."). In fact, there is a fundamental difference between the two types of claims that must be respected if the statute is to be given its proper meaning. In a multimember case, the presence of the *Gingles* preconditions arguably may be enough to establish a violation because it will mean that a minority group would have been able to elect representatives of its choice in single-member district elections, but that it has been unable to do so when submerged in a multimember district. In that specific respect, at least, minority voters in a multimember district case *are* denied the same opportunity accorded the white majority, which obviously can elect representatives of its choice in a multimember district where the *Gingles* preconditions are met.

In a single-member district case, by contrast, proof of the *Gingles* preconditions can *never* be sufficient, in itself, to establish a violation. This is true because, despite the presence of those preconditions, a wide range of plans having more or fewer minority-controlled districts can be drawn. For example, in a city with 50 percent minority voters, plans with six single-member districts could typically be drawn to have

anywhere from one to five minority-controlled districts.[21] In that circumstance, if the *Gingles* preconditions are sufficient to establish a violation, then minority voting strength will always have to be maximized. Four or even five districts will be required, even though the minority group comprises only half the electorate and thus, on a straight proportionality basis, would be entitled to control only three districts.

Section 2 cannot properly be read to include such a maximization principle. If the statutory prohibition against providing minorities "less opportunity than other members of the electorate . . . to elect representatives of their choice" is given its natural meaning, it cannot be violated by a single-member district plan that assures minority groups voting control over numbers of districts that are numerically proportional to their population in the area where presence of the three *Gingles* preconditions has been established. By hypothesis, such an allocation accords minority and other voters the *same* opportunity to elect their preferred representatives. *See Voinovich,* 113 S. Ct. at 1156 ("Only if the apportionment scheme has the *effect* of denying a protected class the *equal* opportunity to elect the candidate of choice does it violate § 2.") (second emphasis added).

---

[21] The publication of block-level census population counts and maps now typically makes it possible to "string" together contiguous blocks to achieve almost any targeted demographic result. More than 30 percent of the blocks in Florida (and more than 20 percent of the blocks in Dade County) have zero population and can be used for "linking" geographically disparate areas to produce a wide variety of demographic profiles for districts. *See* Bureau of the Census, Census of Population and Housing, 1990: Public Law (P.L.) 94-171 Data (Florida) [machine-readable data files] (1991).

Far from undermining this conclusion, as the court below implicitly found, *Gingles* confirms it. Six Justices in that case agreed that "persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters . . . to elect representatives of their choice is not equal to that enjoyed by the white majority." 478 U.S. at 77 (opinion of Brennan, J., joined by White, J.); *see id.* at 103-05 (opinion of O'Connor J., joined by Burger, C.J., and Powell and Rehnquist, J.J.).[22] *See also Baird v. Consolidated City of Indianapolis,* 976 F.2d 357, 360 (7th Cir. 1992) ("Blacks who have influence proportional to their numbers do not state a claim under § 2(a)."), *cert. denied,* U.S.L.W. 3771 (U.S. May 17, 1993); *Nash v. Blunt,* 797 F. Supp. 1488, 1496 (W.D. Mo. 1992) (3 judges) (rejecting maximization claim in a single-member district case), *sum. aff'd sub nom., African American Voting Rights Legal Defense Fund, Inc. v. Blunt,* 113 S. Ct. 1809 (1993).[23]

In summary, the conclusion that the Florida Senate Plan violates Section 2 cannot stand on the basis of the district court's opinion. Bottom-line results — here, undisputed

---

[22] Both opinions suggest, without elaboration, that "it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." 478 U.S. at 77 (footnote omitted); *see* 478 U.S. at 104. Here, as in *Gingles,* however, "[plaintiffs] have not done so." 478 U.S. at 77.

[23] Because *Gingles* was a multimember district case, the question of "persistent" minority representation was important. *See* 478 U.S. at 74-76. In a single-member district case, where boundaries are drawn every ten years based on new census data, persistence is built into the plan itself.

proportionality — must inevitably trump antecedent "preconditions" in "assessing the ability of a protected class to elect its candidates on an equal basis with other voters." *Voinovich,* 113 S. Ct. at 1155.

B. Appellants' Statewide Theory Of Proportionality, Raised For The First Time On This Appeal, Is Legally Unsound And Factually Nonmeritorious

In an attempt to find an alternative rationale for the district court's conclusion, appellants now claim that our proportionality argument is flawed because it fails to establish that Hispanics throughout the State — rather than those residing in Dade County — are proportionally represented.[24] This contention should be rejected for three independent reasons: (1) it was never raised below; (2) it is legally unsound, because it disregards the statutory requirement that government action, not private residential choice, be responsible for preventing a minority from electing representatives of its choice; and (3) it is factually unavailing because, even on a statewide basis, Hispanics comprise 7.15 percent of Florida's citizen population, which is the relevant number for assessing *voting* rights claims, and thus are proportionally entitled to

[24] This argument was advanced by the United States in its filings in response to our Motion to Dismiss or Affirm in Nos. 92-593, 92-767, and to the Florida House of Representatives' Jurisdictional Statement in No. 92-519. The private appellants (De Grandy, *et al.*) indicated that they "agree" with United States's argument on statewide proportionality in their Motion to Dismiss or Affirm, Nos. 92-519, 92-767, at 21.

voting control in only three of the state's forty Senate districts.

1. *Failure To Raise.* There is no question that appellants were fully aware of our Dade County proportionality argument, which was prominently and repeatedly featured in the district court. Testimony of Ron Weber, Tr. VI, 48, J.A. 457-458; Tr. VIII, 51. Yet, at no point did either appellant challenge the argument on the ground that it failed to take account of Hispanics living outside the County. On the contrary, appellants expressly claimed, and agreed to limit their Senate challenge to, vote dilution *in Dade County*. *See* U.S. Complaint ¶ 8, J.A. 75-76; Tr. 1, 51, J.A. 277. In accord with their position, neither appellant submitted any evidence to show *statewide* Hispanic vote dilution, not even evidence relating to the three *Gingles* preconditions, which the appellants concede is necessary to support a vote dilution claim. There is no justification for this omission and therefore no reason to allow an unsupported legal theory to be raised for the first time in this Court. *See, e.g., Youakim v. Miller,* 425 U.S. 231, 234 (1976); *United States v. Mendenhall,* 446 U.S. 544, 551-52, n.5 (1980).[25]

[25] The United States lifts a line out of context from its complaint to suggest that it alleged statewide vote dilution. *See* U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 3-4. In fact, however, its complaint and its representations at trial expressly indicate that it was claiming and attempting to prove vote dilution, not on a statewide basis, but only "in several *areas* of the state" — and as to the Senate, in particular, only in Dade County. U.S. Complaint ¶ 8, J.A. 75-76 (emphasis added); *see also* Tr. 1, 51, J.A. 277. Similarly, the United States now attempts to suggest that there was trial evidence that would support a statewide finding of "racially polarized voting." U.S. Motion to Affirm In Part and Vacate In Part, No. 92-519, at 12, n.3. Significantly, the one cite referenced for that claim is not to evidence put on by the

2. *The Theory Is Legally Unsound.* Relying on their new-found statewide proportionality argument, appellants now claim that it makes no difference under Section 2 that Hispanics in Dade County are accorded the same opportunity to elect representatives of their choice as are whites in Dade County. Rather, the relevant legal question in resolving whether the Senate Plan in Dade County violates Section 2, they say, is whether Hispanics *throughout Florida* have been given the same opportunity as have whites throughout the State. This theory is at war with Section 2's language and this Court's decision in *Gingles*. It should be rejected.

Section 2 requires minority plaintiffs to show not only a denial of equal opportunity, but also that the denial was caused by *government* action — *i.e.*, a "voting qualification or prerequisite to voting or standard, practice, or procedure . . . *imposed or applied by any State or political subdivision.*" Section 2(a), 42 U.S.C. § 1973 (emphasis added). That requirement is improperly discarded under appellants' statewide theory. By drawing district boundaries that do *not* dilute minority strength within reasonably compact geographical areas, the State cannot fairly be said to be diluting the vote of minorities who happen to live in remote areas, where they are too few in number to achieve voting control. In such circumstances, Section 2 "simply does not speak to the matter," precisely because it is private residential choice rather than the state's "apportionment scheme [that] has the

---

United States. In any event, the district court made no statewide findings and it is clear that there was no evidence — because there could be none — to satisfy the first *Gingles* factor on a statewide basis. *See* pp. 25-27, *infra*.

effect of denying a protected class the equal opportunity to elect their candidate of choice." *Voinovich,* 113 S. Ct. at 1156 (emphasis supplied).

The Court in *Gingles* made this point directly. Indeed, the whole purpose of the first "precondition" — that a minority group be "sufficiently large and geographically compact" — is to ensure that government action is the cause of vote dilution. As the Court explained:

> Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice. . . . Thus, if the minority group is spread evenly throughout a multimember district, or if, although geographically compact, the minority group is so small compared to the surrounding white population that it could not constitute a majority in a single-member district, these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure.

478 U.S. at 50, n.17 (emphasis in original).

In other words, Section 2 requires that minority voters be sufficiently numerous and geographically compact because only then can they be denied an equal opportunity to elect representatives through the government's "manipulation of district lines." *Voinovich,* 113 S. Ct. at 1155. For that reason, we submit, six Justices in *Gingles* found proportionality *within a single district* to be a complete defense to a Section 2 claim, even though statewide proportionality had

not been achieved. *See Gingles,* 478 U.S. at 103 (O'Connor, J., concurring) ("The district court clearly erred to the extent that it considered electoral success in the aggregate rather than in each of the challenged districts, since, as the Court states, '[t]he inquiry into the existence of vote dilution . . . is district specific.' ") (quoting 478 U.S. at 61, n.28).

The United States's contrary argument simply neglects to mention the first *Gingles* precondition. *See* U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 3-7; U.S. Motion to Affirm in Part and Vacate in Part, No. 92-519, at 11-14.[26] Thus, even if the United States had, as it incorrectly argues here, brought a suit to require Florida "to remedy dilution throughout the State" (*id.* at 12), that claim obviously would have been insupportable. The State of Florida is far too large an area to satisfy the *Gingles* requirement of numerosity within a geographically compact area. Outside

[26] The United States seeks instead to support its statewide claim by reference to the second and third *Gingles* preconditions — "voting is polarized along ethnic lines throughout the State" (*id.* at 12, n.3). That suggestion is as wrong as it is insufficient. The notion that there is statewide cohesion among Hispanic voters, far from being supported by the record, is strongly undermined by it. The evidence demonstrates that, while Hispanic voters in Dade County generally vote Republican, Hispanics in other areas tend to vote Democratic. *See, e.g.,* J.A. 164, Aff. of Dr. Thomas B. Hofeller (expert for De Grandy appellants) ("Tampa's Hispanic community is predominantly Democratic and, *as noted by the Department of Justice,* is cohesive with black voters") (emphasis added). Even within Dade County, there are exceptions to the general rule. In particular, as the district court found, Hispanic farm workers in south Dade County tend to vote Democratic and are politically cohesive with African-Americans. U.S. App. 65a-66a; Testimony of Representative Willie Logan, Tr. III, 147.

Dade County, Hispanics are too few in number and too dispersed to compose a majority-minority district.[27]

The United States's effort to eliminate the first *Gingles* precondition and to recast proportionality on a statewide basis is not assisted by its argument that, in vote dilution cases generally, some minorities end up "liv[ing] outside the remedial district." U.S. Motion to Affirm in Part and Vacate in Part, No. 92-519, at 12 (citing cases). That fact is equally true when minorities *do* live in a geographically compact area, and simply reflects the inevitable effect of the "group rights" theory that undergirds vote dilution cases. Indeed, Section 2 prohibits the packing of minorities " 'into districts where they constitute an *excessive* majority.' " *Voinovich,* 113 S. Ct. at 1155 (quoting *Gingles,* 478 U.S. at 46, n.11) (emphasis added). The authorities relied on by the United States make this obvious point (*see, e.g., McGhee v. Granville County,* 860 F.2d 110, 118, n.9 (4th Cir. 1988), but they cannot fairly be extrapolated to support the very different notion that geographically dispersed minority voters must be "represented" by elected officials from distant reaches of the State in order to ensure "equal opportunity" for minorities. *Cf. McGhee,* 860 F.2d at 119 ("*Gingles* . . . 'precludes some small and unconcentrated minority groups from attempting to rectify vote dilution.' ") (quoting *McNeil*

[27] The total population of all census blocks outside Dade County having a majority Hispanic VAP is 111,421, and the total Hispanic VAP of those blocks is 53,087. The blocks are spread across 64 counties (only Baker and DeSoto are not represented) and the only county with more than 10,000 Hispanic VAP is Hillsborough, with 19,223. 1990 Census, Public Law (P.L.) 94-171 Data.

v. Springfield Park Dist., 851 F.2d 937, 944-45 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989)).[28]

Finally, the United States attacks our geographic approach to proportionality on the ground that it "cannot work" because "plaintiffs will almost always be able to define an area in which there is not proportional representation, while defendants will almost always be able to define an area in which there is." U.S. Br. In Opp. to Motion to Dismiss or Affirm, No. 92-767, at 6. But only by choosing to untie its own analysis from the first *Gingles* precondition (and its rationale) can the United States advance this specious argument. The boundaries under our theory are clearly

[28] The United States is similarly incorrect in asserting that this case is "precisely parallel to *Davis v. Bandemer*, 478 U.S. 109 (1986)." U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 4. While the plurality there said that "appellees' claim, as we understand it, is that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination" (478 U.S. at 127), the difference is that in Ohio, concentrations of Democratic voters could be found statewide, while Florida's concentration of Hispanic voters is in a single county. Thus, in *Davis*, the state's "reapportionment plan" — not private residential choice — affected Democrats on a statewide basis.

It is also instructive that the plurality in *Davis* rebuffed the Democrats' claim, finding that, although their candidates received 52 percent of the vote but won only 43 percent of the elections, these numbers did not indicate a "continued frustration of the will of the majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.* at 133. In this case, of course, the undisputed numbers demonstrate that Hispanics could not make even a statewide claim as strong as the one rejected in *Davis* — they have 12 percent of the total population and receive voting control over 7.5 percent of the districts.

defined by the *Gingles* requirement of geographical compactness. Here, of course, they were chosen by the appellants, presumably in order to maximize minority representation to the extent possible. Having drawn those boundaries — and having then sought to satisfy the *Gingles* preconditions with respect to them — appellants can hardly be heard to complain when they are required to stay within them.

3. *A Statewide Proportionality Theory Is No Help to Appellants Here.* Appellants' reliance on statewide numbers as the measure for testing proportionality is also futile. Even on that basis, Hispanics comprise 7.15 percent of the eligible voters in Florida. *See* U.S. Mot. to Affirm in Part and Vacate in Part, No. 92-519, at 14, n.5 (citing 1990 census data). That means Hispanics are proportionally entitled to voting control over three (or 7.5 percent) of the forty Senate districts in Florida. And that, as the district court found in this case, is the number that Hispanics are able to control under the Florida Plan (*i.e.*, the three seats in Dade County). U.S. App. 64a.

The United States appears to agree with the force of this contention, but nevertheless argues that the case should be remanded for the district court to consider the issue. *See* U.S. Br. in Opp. to Motion to Dismiss or Affirm, No. 92-767, at 6-7. There is no reason for another round of litigation, however. The 7.15 percent census figure is disputed by no one, which is hardly surprising given the fact that, in proving their case, appellants themselves relied on data from the

identical census that yielded the citizenship numbers.[29] Such census data, of course, routinely provide the essential numerical information in voting rights cases, and courts frequently take judicial notice of them. *See, e.g., Barber v. Ponte,* 772 F.2d 982, 998 (1st Cir. 1985), *cert. denied,* 475 U.S. 1050 (1986); *Wyche v. Madison Parish Police Jury,* 635 F.2d 1151, 1157 (5th Cir. 1981). The only reason that the precise number of Hispanic non-citizens was not introduced at trial here was because "Hispanic citizenship data [was] not available." U.S. App. 74a (concurring opinion); *see* p. 9, note 12, *supra,* p. 4, note 4, *supra.* But that is no justification for disregarding the undisputed number now that it is available, or for needlessly prolonging this case.

Unlike the United States, the De Grandy appellants contend that citizenship numbers are irrelevant in a vote dilution case and that the district court properly used VAP numbers. *See* De Grandy Motion to Dismiss or Affirm, Nos. 92-519, 92-767, at 14-15. That argument ignores the language and purpose of the statute, which is intended to protect the "right . . . to vote," a right available only to citizens. Indeed, it is oxymoronic to suggest that Section 2 affords non-citizens an "opportunity . . . to elect representatives of their choice." The Voting Rights Act protects eligible voters, a point made three times in the text of the statute, which speaks of "the right of any *citizen* of the United States to vote"; requires that the election process be "equally open to

[29] For example, the 50 percent number for Hispanic VAP in Dade County (or, indeed, the 12 percent number for statewide Hispanic VAP), as well as the numbers concerning each individual Senate district, all came from the same 1990 census count.

participation by members of a class of *citizens*"; and protects minority voters from receiving "less opportunity than other *members of the electorate.*" Section 2, 42 U.S.C. § 1973 (emphasis added). In accord with this statutory language and purpose, the courts of appeals have uniformly held that the number of citizens, not overall population, is relevant in Section 2 cases. *See Romero v. City of Pomona,* 883 F.2d 1418 (9th Cir. 1989); *McNeil v. Springfield Park Dist.,* 851 F.2d 937 (7th Cir. 1988), *cert. denied,* 490 U.S. 1031 (1989); *Brewer v. Ham,* 876 F.2d 448 (5th Cir. 1989); *see also Gingles,* 478 U.S. at 50-51, n.17 (requirement of sufficiently large and geographically compact districts based on "minority voters").[30]

Ignoring Section 2's language and purpose, the De Grandy appellants attempt to support the contrary conclusion by arguing that because the Florida Senate districts were drawn on the basis of population, the issue of proportionality must be similarly resolved. According to these appellants, "[t]he dual population base measure . . . would allow the Anglo community of South Florida to use the higher minority population to locate additional seats in that region of the State, but would prevent the Hispanic community from sharing in the benefit of those additional seats." De Grandy Motion to Dismiss or Affirm, Nos. 92-519, 92-767, at 14 (footnote omitted). Even if the premise of this argument were

[30] The De Grandy appellants rely on *Garza v. County of Los Angeles,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991), which upheld the use of population numbers in a Fourteenth Amendment challenge to a reapportionment plan. That ruling, whatever its merit, is unconstrained by the "citizen" language that controls Section 2. The Fourteenth Amendment, by contrast, extends to all "person[s]."

correct, however, it would still be wrong to conclude that Hispanics were "prevent[ed] . . . from sharing in the benefit." *Id.* As we have shown, Hispanics have voting control in three of the six districts which Dade County is entitled to receive on the basis of population. They thus did in fact share in any benefit that might have arisen from using such numbers to allocate Senate districts in Florida. But on a *statewide* basis — which is where the appellants, not we, claim that proportionality should be assessed — a comparison based solely on citizenship is entirely consistent in its treatment of both Hispanics and other voters.

II. THE DISTRICT COURT'S FACTUAL FINDING THAT THE FLORIDA SENATE PLAN MOST FAIRLY BALANCES THE COMPETING INTERESTS OF AFRICAN-AMERICAN AND HISPANIC VOTERS ALSO DEMONSTRATES THAT THE PLAN DOES NOT VIOLATE THE VOTING RIGHTS ACT

This case presents a unique consideration that would compel affirmance of the judgment below even if the district court's maximization theory were correct. In the Dade County area, there are two substantial minority groups, Hispanics and African-Americans, and these groups have sharply "competing interests." U.S. App. 63a. (Hispanics support Republicans, African-Americans support Democrats, and each group tends to prefer white candidates over candidates preferred by the other group. *Id.* at 44a, 49a-50a.) This fact, viewed in the context of existing residential patterns, means that, as the district court found, although each minority group can increase *its* voting power, it can only do so at the expense of the other group. *Id.* at 63a-64a. Thus, the court concluded, of "all the plans presented to the court, the Florida Senate Reapportionment plan is *fairest* to all the ethnic communities in Dade County and the surrounding areas." *Id.* at 66a (emphasis added).

This "fairness" finding can only mean that Section 2 was not violated here. It is one thing for a State to make adjustments between a protected minority group and the competing interests of the *white* majority. But it is obviously a very different matter to make such adjustments solely affecting the competing interests of *two protected minority groups*. Even if the statute imposes a maximization requirement, therefore, that requirement surely would have to give way when an attempt to maximize one protected group's interests simultaneously would erode the interests of another protected group. It simply makes no sense to read Section 2 as disabling a state from balancing these competing interests "fairly" — in this case by effectively providing at least proportional representation to both groups.[31]

Appellants dispute this conclusion on two grounds: first, the United States argues that one of the plans before the district court (Plan 180) established a fourth Hispanic district without impairing the interests of African-American voters;

---

[31] On the basis of its "fairness" finding, the district court's opinion concludes that "although the Florida Senate Plan violates Section 2 of the Voting Rights Act, it nevertheless is the best remedy." U.S. App. 72a. Predictably, appellants fasten on the incongruity of adopting a plan that violates the statute as a remedy for the violation. The obvious answer to this seeming conundrum is that the finding can only mean there was *no* violation, as the court correctly found in its earlier judgment.

and second, both appellants claim that they were entitled to an additional hearing to introduce yet more plans in an attempt to show that four Hispanic and three African-American Senate districts can be successfully drawn. Neither argument has merit.

To start with, while the United States challenges the district court's "fairness" conclusion, it neglects to mention that such a determination is a finding about "vote dilution [which is] a question of fact subject to the clearly-erroneous standard of Rule 52(a)." *Gingles,* 478 U.S. at 78. That demanding standard for reversal cannot be met here. As the district court found, under the Senate Plan, African-Americans are effectively able to elect representatives of their choice in *three* Senate districts in South Florida — one wholly in Dade, one partially in Dade, and one in the counties just north of Dade. U.S. App. 64a-65a. This is true, as the evidence concerning past elections demonstrates, even though, in one of those districts, African-Americans constituted 36 percent of the VAP. *See id.* at 65a ("African-Americans [in District 40] can elect a candidate of their choice because of strong minority coalitions between African-Americans and Mexican-Americans, as well as white cross-over votes").[32] On the other hand, as the district court also

[32] Notably, in the 1992 election, which was conducted under the Senate Plan, the African-American candidate in District 40 won election with 66 percent of the Democratic primary vote over the white candidate. Both candidates were incumbent House members, and the seat was uncontested in the general election. Div. of Elections, Fla. Dept. of State, State of Florida Official Primary Election Returns, Sept. 1 & 8, 1992, Oct. 1, 1992; Div. of Elections, Fla. Dept. of State, State of Florida Official General Election Returns, Nov. 3, 1992.

found, under Plan 180 — on which the United States relies — African-Americans would likely be able to elect their preferred candidates in only *two* South Florida Senate districts. U.S. App. 62a-63a. While the United States maintains that African-Americans would have been able to control a third district in Plan 180, made up of 47 percent African-American VAP, the district court's contrary conclusion is well supported by expert testimony based on voting history and testimony at public hearings.[33]

Appellants' alternative argument, that they are entitled to a remand for further hearings on this issue, is equally unsound. Appellants complain that they were not required to anticipate that the district court would find the Senate Plan in violation of the Section 2 rights of African-Americans and, accordingly, they were under no obligation to submit a plan that would remedy such a violation. But that argument misses the point. The district court faulted the plans supported by the appellants, not because they failed to remedy a violation of African-Americans' rights, but because their attempt to remedy the alleged violation of Hispanics' rights *worsened*

[33] The United States suggests that a 47 percent African-American district is certainly more likely to elect a representative preferred by African-Americans than is a 36 percent district. The district court was more careful in its analysis. Based on the evidence, it recognized that, normally, African-Americans can elect their preferred candidate only when they compose more than half the VAP. U.S. App. 62a-63a. District 40 of the Florida Senate Plan is unique, largely because of the presence of a substantial population of Hispanic farmworkers in south Dade County that is politically cohesive with African-Americans in the district — a fact confirmed by past voting patterns. Testimony of Representative Willie Logan, Tr. III, 147, U.S. App. 65a-66a. Testimony of John Guthrie, Tr. IV, 155, U.S. App. 65a.

the situation of African-Americans. As to that issue, appellants were fully aware of the district court's concerns. The court early on made it clear to all parties that the NAACP's sole function at trial was limited to introducing evidence as to "whether establishment of the fourth Hispanic district would have a regressive effect on African-American voters." U.S. Juris. St'mt 4-5 (record citations omitted). There was clearly no surprise here.

More fundamentally, the simple fact is that an electoral map with four Hispanic districts cannot reasonably be drawn in the Dade County area without simultaneously disadvantaging African-Americans. The proposals that attempted to do otherwise went far beyond the compact seven-district area covered by the Florida Senate Plan. One proposed plan involved eight new counties (in addition to Dade, Monroe, and Broward) and an area up to 110 miles wide extending 125 miles north of Dade County. *See* Senate Def. Exh. 3. The other involved seven new counties and an area up to 50 miles wide extending 145 miles north of Dade County. *See* Senate Def. Exh. 4. If, within that incredibly wide swath, two separate plans, while obviously trying to do so, could not create a fourth Hispanic district without having a negative impact on African-American voters, it plainly must mean that the balance struck by the Florida Senate Plan — in a far more compact area — is fair and reasonable, as the district court found.

That "fairness" finding supports the district court's deference to legislative policy choices for balancing these competing interests. Tr. VIII, 53, J.A. 477 ("Consequently, under Supreme Court precedent, this Court must give deference to the state policy as expressed in the Florida plan as validated

by the Florida Supreme Court."); *see also* U.S. App. 64a; *Scott v. Germano*, 381 U.S. 407 (1965). Moreover, it amply justifies the conclusion that the State Plan does not violate Section 2. There is thus no warrant for perpetuating this inquiry, even if some incredibly contorted line-drawing could possibly mark out boundaries that would allow Hispanics to elect four representatives without eroding the ability of African-Americans to elect three.

CONCLUSION

The district court judgment of no liability should be affirmed.

Respectfully submitted,

JOEL I. KLEIN
Klein, Farr, Smith & Taranto
2445 M Street, N.W., Suite 225
Washington, D.C. 20037
(202) 775-0184

RICHARD E. DORAN
GEORGE L. WAAS
GERALD B. CURINGTON
Assistant Attorneys General
Department of Legal Affairs
Tallahassee, Florida 32399
(904) 488-1573

STEPHEN N. ZACK*
NORMAN C. POWELL
Zack, Hanzman, Ponce, Tucker,
Korge & Gillespie, P.A.
100 S.E. Second Street, Suite 2800
Miami, Florida 33131
(305) 539-8400

KEITH E. HOPE
100 S.E. Second Street, Suite 2100
Miami, Florida 33131
(305) 358-4410

* Counsel of Record

FILED
JUL 6 1993
OFFICE OF THE CLERK

(14) (10)

Nos. 92-767 and 92-593

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF FLORIDA, ET AL.

MIGUEL DE GRANDY, ET AL., APPELLANTS

v.

BOLLEY JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Cases:	Page
Campos v. *City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989)	6
Davis v. *Bandemer*, 478 U.S. 109 (1986)	3, 4
McGhee v. *Granville County*, 860 F.2d 110 (4th Cir. 1988)	3
Thornburg v. *Gingles*, 478 U.S. 30 (1986)	6, 7
Statute:	
Voting Rights Act, § 2, 42 U.S.C. 1673	1, 2, 4, 8, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-767

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF FLORIDA, ET AL.

No. 92-593

MIGUEL DE GRANDY, ET AL., APPELLANTS

v.

BOLLEY JOHNSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

REPLY BRIEF FOR THE UNITED STATES

In defending the State's plan for Senate districts, the Senate appellees challenge the district court's finding of liability under Section 2 of the Voting Rights Act. But appellees then argue that the district court in any event correctly ordered that the very state plan it found to violate Section 2 must remain in effect for the next decade as a "remedy."

Both of appellees' attempts to support the judgment below are unavailing.

1. The Senate appellees' principal contention on the issue of liability is that proof of proportional representation "trumps" proof of the three *Gingles* preconditions in determining whether there is a violation of Section 2. Br. 17-22. As we explained in our brief as appellee on the appeal concerning the Florida House of Representatives (92-519 U.S. Br. 14-15), we agree that proof of persistent proportional representation generally would be a defense to a Section 2 claim. But the Senate appellees have failed to demonstrate that the State's Senate plan provides the Hispanic population with proportional representation.

The State Senate has 40 members and Hispanics constitute 12.2% of the State's total population. J.A. 74. Thus, a plan designed to afford the Hispanic population proportional representation in the State Senate would have five Hispanic majority districts (40 x 12.2% = 4.88). The State's plan, however, contains only three such districts.

a. The Senate appellees are able to assert that the State's plan affords the Hispanic population proportional representation only by isolating the Dade County area from the rest of the State. But the United States and the De Grandy plaintiffs did not challenge the redistricting plan for the Dade County Senate; they challenged the redistricting plan for the Florida Senate. The State's proportional representation defense never comes to grips with this fact.[1]

[1] The Senate appellees assert (Br. 23) that the United States did not allege vote dilution on a statewide basis, and that there accordingly was no need for them to raise a proportional representation defense on a statewide basis. But as we explain in our brief on the appeal concerning the House of Representatives (92-519 U.S. Br. 32-34), the United States alleged and proved vote dilution on a statewide basis with respect to both the House and the Senate.

b. Nor do appellees adequately address the case law supporting a statewide approach, including *Davis* v. *Bandemer*, 478 U.S. 109, 127 (1986) (opinion of White, J.); *id.* at 169 (Powell, J., concurring in part and dissenting in part), and *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 & n.9 (4th Cir. 1988). As discussed in our brief on the House appeal (92-519 U.S. Br. 20-21), those cases establish that when plaintiffs challenge the redistricting of a body with statewide jurisdiction, the proper frame of reference for a proportional representation defense is statewide.

The Senate appellees argue (Br. 27) that *McGhee* simply stands for the proposition that not all minority group members will wind up in the remedial districts in which the minority group constitutes the majority. But we did not cite *McGhee* for that "obvious point" (Appellees' Br. 27). Instead, we cited *McGhee* for the court's express recognition that vote dilution affects all minority voters in the jurisdiction, specifically including those who live outside the geographically compact area, defined by the first *Gingles* precondition, in which the minority group could constitute a majority. See 860 F.2d at 118 n.9 ("[H]ere—as in dilution cases generally—the claim of dilution by submergence is made by a class consisting of *all* the [minority] voters of the jurisdiction."); see also 92-519 U.S. Br. 20. Indeed, it was the treatment of those "geographically dispersed minority voters" (Appellees' Br. 27)—not the voters within the geograph-

ically compact majority-minority districts—that was at issue in *McGhee*. Appellees offer no explanation for why *McGhee*'s reasoning is incorrect, or why it is inapplicable to this case.[2]

Nor do appellees succeed in distinguishing *Davis* v. *Bandemer*. Appellees state (Br. 28 n.28) that "the difference [between this case and *Davis*] is that in Ohio, concentrations of Democratic voters could be found statewide, while Florida's concentration of Hispanic voters is in a single county."[3] Neither the plurality nor any other opinion in this Court discussed how evenly concentrations of Democratic voters were distributed throughout the State. Indeed, in language quoted by appellees, the plurality specifically explained that the claim was brought on behalf of *all* Democratic voters in the State: the vote dilution affected "Democratic voters over the State as a whole, not Democratic voters in particular districts." 478 U.S. at 127 (quoted at Appellees' Br. 28 n.28). The same point was made by two Justices who did not join the plurality. See 478 U.S. at 169 (Powell,

[2] It is of course true that in *McGhee* the members of the minority group lived in a single county, while members of the minority group in this case live throughout the State. That is unsurprising, in light of the fact that *McGhee* involved dilution of the minority vote for members of a county governing body, while this case involves dilution of the minority vote for members of the state legislature. A county occupies a smaller area than a State, but the coverage of Section 2 is surely not limited to relatively small jurisdictions. The members of the minority group in *McGhee* may well have been just as geographically dispersed through the county as are Hispanics in the State of Florida.

[3] *Davis* in fact involved the apportionment of the Indiana legislature, not that of Ohio. 478 U.S. at 113.

J., joined by Stevens, J., concurring in part and dissenting in part). Thus, six Justices concluded in *Davis* that vote dilution affects the disadvantaged group statewide, regardless of whether the concentrations of members of the particular group alleging a violation (in that case, Democrats) are evenly dispersed throughout the State or located in particular areas of the State. Again, appellees do not explain why the same analysis is inapplicable in this case.

c. In our brief as appellee on the House appeal (92-519 U.S. Br. 24-26), we showed that in redistricting cases involving statewide legislative bodies, only a statewide test of proportional representation is workable. Although the Senate appellees label that argument "specious" (Br. 28), their only basis for that characterization is their claim that "[t]he boundaries under [the Senate appellees'] theory are clearly defined by the *Gingles* requirement of geographic compactness." Br. 28-29. The Senate appellees, however, have never "clearly defined" the area in which proportional representation is to be measured under their view, and even now they do not define it as the area in which the plaintiffs demonstrated that the minority group was geographically compact.

The Senate appellees do offer (Br. 16) three alternative areas in which proportional representation could be measured—Dade County, the seven districts lying wholly or partially within Dade County, or the five districts lying wholly within Dade County. They suggest no reason for selecting one of these over the other, or for selecting any of those three areas over innumerable other subparts of the State.

Nor are any of appellees' three alternative areas "clearly defined by the *Gingles* requirement of geographical compactness." The *Gingles* compactness precondition requires plaintiffs to show that the minority group is sufficiently large and geographically compact to constitute a majority in one or more single-member districts. *Thornburg* v. *Gingles*, 478 U.S. 30, 50 (1986). In this case, the district court found that the plaintiffs had satisfied that requirement by introducing a plan in which Hispanics constitute a majority in four compact single-member districts. J.S. App. 40a-41a. The Senate appellees have not challenged that finding. Thus, the only area even arguably defined by the *Gingles* compactness requirement is the area within the four Hispanic majority districts drawn by the plaintiffs. Yet the Senate appellees do not even now rest their proportional representation defense on the area within those four districts. Nor do they explain how proportional representation for Hispanics in those four districts would be calculated.

In addition, even the area within the districts drawn by the plaintiffs is not necessarily "clearly defined" by the compactness requirement. In this case, the plaintiffs could no doubt have satisfied the compactness requirement by drawing districts that differed in at least some respects from those in the plan (Plan 180) that they proffered. And even if that were not true in this case, there will be many vote dilution cases in which plaintiffs can offer alternative ways to draw majority-minority districts. In *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 n.5 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989), for example, the court found that plaintiffs had shown that the

Gingles compactness requirement could be satisfied in three different ways. If the Senate appellees' approach were adopted, there would be no principled way to decide which of the alternative plans should be used to determine whether there is proportional representation.

The fact that the compactness requirement does not provide a workable solution here is hardly surprising. This Court did not adopt the compactness requirement in *Gingles* to deal with the issue of proportional representation. That requirement serves a very different purpose—to ascertain whether the minority group is sufficiently large and geographically compact to constitute a majority in one or more single-member districts and thereby to determine whether the dilution of the minority vote is attributable to the geographic dispersal of the minority or the failure to create majority-minority districts. 478 U.S. at 50 n.17. It does not answer the question whether a minority group, despite the presence of racial bloc voting, has achieved or can achieve persistent proportional representation.

d. Finally, the Senate appellees argue (Br. 29-32) that census figures not in the record and not before the district court establish that Hispanics would be represented statewide under the State's plan in proportion to their percentage of the citizen voting age population. For the reasons given in our brief on the House appeal (92-519 U.S. Br. 26-32), any claim of proportional representation based on those figures rests on dubious legal and factual premises that have not been litigated before the district court or any other lower court. Accordingly, it is not ripe for consideration by this Court.

2. In our opening brief (at 12-16), we argued that the district court erred in imposing the State's plan as a remedy without first conducting remedial proceedings to determine whether it was possible to fashion a plan containing four Hispanic majority districts and three African-American majority districts. We pointed out (Br. 14) that the district court mistakenly relied on the highly equivocal statements of one witness and the unsworn statements of counsel for one party in finding that a 4-3 plan was not feasible. More important, we noted (Br. 14-15) that the court never informed the parties that it would make its decision concerning the possibility of a 4-3 remedy based on evidence introduced at the liability phase of the trial.

a. The Senate appellees make no effort to defend the court's reliance on the equivocal statements of counsel and a single witness. Nor do they disagree with our submission that the feasibility of a 4-3 plan was not at issue during the trial. Instead, the Senate appellees argue (Br. 34-35) that the district court's finding that the State's plan is the "fairest" to all ethnic groups, see J.S. App. 66a, is equivalent to a "totality of circumstances" finding that there was no Section 2 violation at all and is therefore entitled to a highly deferential standard of review. Appellees are wrong.

The district court made quite clear that its "fairness" conclusion was not a "totality of circumstances" finding that the Florida plan did not violate Section 2. See J.S. App. 72a ("the Florida Senate plan violates Section 2 of the voting rights act"). Rather, the court was of the view that, because an "ideal" (J.S. App. 60a) 4-3 remedy was not possible, the State's plan

was the fairest remedy for the violations it had found. Appellees do not offer a persuasive reason for failing to take the district court at its word.[4] Indeed, the Senate appellees' attempt (Br. 34) to obtain special deference for the supposed "totality of circumstances" finding of no Section 2 violation is particularly odd in a case in which the district court made an express "totality of circumstances" finding that there *was* a Section 2 violation. See. J.S. App. 30a.

b. In defending the district court's adoption of the State's plan, the Senate appellees also rely on the district court's finding that the plaintiffs' Plan 180 would have "impair[ed] the interests of African-American voters" by creating a less effective African-American "influence" district than that in the State's plan. Br. 33; see J.S. App. 63a. As explained in our opening brief (Br. 16-18), the district court found that both Plan 180 and the State's plan contained two African-American majority districts and one "influence" district. Although the district court found that the influence district in the State's plan was more effective than the one in Plan 180, that was only because the court applied different legal standards to gauge their effectiveness. The Senate appellees argue (Br. 34-35) that there are factual differences

[4] The Senate appellees rely (Br. 13 & n.17) on a statement in the court's July 2 judgment that there was no violation of Section 2. See J.S. App. 5a. In its subsequent opinion, however, the court clarified that it meant that there was a violation, but that the State's plan was the fairest remedy. See J.S. App. 72a. As we noted at the jurisdictional stage, the court clearly had the authority to write an opinion clarifying the basis for its judgment. See J.S. 9 n.7; U.S. Br. in Opp. to Mot. to Dismiss or Affirm 1-3.

between the two districts, but they offer no defense of the court's inconsistent legal analysis.

In any event, we are not asking this Court to hold that Plan 180 should be imposed as a remedy. That plan was introduced for the sole purpose of proving the first *Gingles* precondition. Once the district court found that the precondition was satisfied and that violations of Section 2 had occurred, any perceived deficiencies in Plan 180 became irrelevant. At that point, the district court should have held a remedial hearing to determine the appropriate remedy, at least for elections after 1992. See U.S. Br. 19.

The Senate appellees seek (Br. 33) to justify what the district court did on the ground that "the competing interests of *two protected minority groups*" were at stake. But it is precisely because of the district court's finding of a Section 2 violation as to each of two minority groups that the district court should have given particularly careful consideration to whether a plan could be devised to remedy *both* violations, rather than approving a plan that remedied *neither*—and indeed was the very plan that the court found to violate the Act.

c. Finally, appellees suggest (Br. 36-37) that a 4-3 plan is simply not feasible. The De Grandy plaintiffs, however, have already offered a motion for reconsideration containing such a plan. And we are confident that there are other ways to accomplish the same objective. More important, this issue cannot be resolved on the basis of assertions of the parties in this Court. It must be decided on the basis of evidence received at a remedial hearing. The purpose of our appeal is to secure such a hearing.

For the foregoing reasons and those stated in our opening brief, the district court's remedial order should be vacated and the case should be remanded with directions to determine the appropriate remedy for future elections.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JULY 1993

No. 92-593

Supreme Court, U.S.
FILED
JUL 7 1993
OFFICE OF THE CLERK

In The Supreme Court Of The United States

MIGUEL DE GRANDY, et al.

Appellants,

v.

BOLLEY JOHNSON, et al.

Appellees.

On Appeal From The United States District Court For The Northern District Of Florida Tallahassee Division

---

REPLY BRIEF

C. Allen Foster*
Robert N. Hunter, Jr.
Benjamin L. Ginsberg
Marshall R. Hurley
Patton, Boggs & Blow
P.O. Drawer 20004
Greensboro, NC 27401
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
Rumberger, Kirk & Caldwell
P.O. Box 10507
Tallahassee, FL 32302
(904) 222-6550

Alberto R. Cardenas
Ferrell, Cardenas, Fertel & Morales
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
***Counsel of Record**

BEST AVAILABLE COPY

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

TABLE OF CONTENTS

Page

ARGUMENT 1

1. The plain language of Section 2 and its legislative history fail to support the application of a per se proportionality defense. 3

2. Section 2 may be violated even in the presence of proportional representation. 6

3. The Appellees failed to establish that the state's reapportionment plan provides for proportional representation in the State of Florida. 7

4. The state as a whole is the correct geographic area in which a court should evaluate a claimed defense of proportionality. 9

CONCLUSION 12

TABLE OF CITATIONS

Page

Cases

Baird v. Consolidated City of Indianapolis,
976 F.2d 357 (7th Cir. 1992) 5, 6

Campbell v. Theodore,
No. 92-219, 1992 WL 194585
(U.S. June 14, 1993) 2

City of Rome v. United States,
446 U.S. 156 (1980) 8

De Grandy v. Wetherell,
794 F. Supp. 1076 (N.D. Fla. 1992) 8

Gingles v. Edmisten,
590 F. Supp. 345 (E.D.N.C. 1984) 10

Growe v. Emison,
___ U.S. ___, 113 S. Ct. 1075 (1993) 9

Nash v. Blunt,
797 F. Supp. 1488 (W.D. Mo. 1992),
aff'd sub nom. African-American
Voting Rights Legal Defense Fund,
Inc. v. Blunt, 61 U.S.L.W. 3682
(April 5, 1993) 8

Rogers v. Lodge,
458 U.S. 613 (1982) 8

Shaw v. Reno,
No. 92-357, 1993 WL 224459
(U.S. June 28, 1993) 2, 5, 9

Thornburg v. Gingles,
478 U.S. 30 (1986) . . . . . passim

Voinovich v. Quilter,
___ U.S. ___, 113 S. Ct. 1149 (1993) 9

White v. Regester,
412 U.S. 755 (1973) 4, 8

Statutes

42 U.S.C. § 1973 3

42 U.S.C. § 1973(b) 11

Other

S. Rep. No. 417, 97th Cong. 2d Sess. 31
(1982), reprinted in 1982 U.S. Code
Cong. & Admin. News 208 . . . . . 2, 4, 5, 10

No. 92-593

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

MIGUEL DE GRANDY, et al.

Appellants,

v.

BOLLEY JOHNSON, et al.

Appellees.

On Appeal From The United States District Court
For The Northern District Of Florida
Tallahassee Division

REPLY BRIEF

ARGUMENT

The fundamental issue presented by the De Grandy Appellants (and by the United States) in its appeal concerns the nature and extent of a district court's duty to remedy completely an established violation of Section 2 of the Voting Rights Act. The brief of the Florida Senate fails to address directly the substance of this issue and, instead, insists that its purported defense of proportionality precludes liability.

The district court erred, first, by failing to provide a remedy hearing for the violations it found and, then, by

imposing the illegal plan both for the 1992 elections and for post-1992 elections. The district court should not have taken that serious and final action without first conducting a complete and orderly proceeding to determine whether other options -- including the plan offered by the Appellants -- would remedy the violation.[1] The lower court's conclusory statement that "the Florida Senate Reapportionment plan is the fairest to all ethnic communities in Dade County" cannot be reconciled with its finding of a violation of Section 2 and should not be sustained in light of the court's failure to examine other alternatives. Accordingly, the district court's judgment adopting the state's plan should be vacated and the case should be remanded for further remedial proceedings.[2]

[1] See Affidavit of Rockie Pennington, Appellants' Jurisdictional Statement App. 110. Neither the district court's opinion nor the State's brief addresses the Appellants' contention that Mr. Pennington's plan, offered at the conclusion of the liability phase, demonstrated the ability to draw a practical, effective districting plan with four Hispanic and three African-American majority districts without violating the rights of any protected class in south Florida and without running afoul of this Court's recent condemnation of any district that is, "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." Shaw v. Reno, No. 92-357, 1993 WL 224459 at *14 (U.S. June 28, 1993).

[2] The necessity of formulating a remedy which "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice" (citing S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News at 208) is underscored by this Court's recent decision in Campbell v. Theodore, No. 92-219, 1992 WL 194585 (U.S. June 14, 1993).

Under the facts of this case, the allegedly proportional allocation of Senate seats in the state's Senate districting plan provides no per se affirmative defense to a Section 2 claim, for four reasons:

1. The plain language of Section 2 and its legislative history fail to support the application of a per se proportionality defense.

The language of the proportionality "disclaimer" contained in amended Section 2 provides, in part, as follows: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973. There is no dispute that this language precludes Section 2 plaintiffs from basing a liability claim upon a mere showing that a minority group has failed to achieve proportional representation.

The disclaimer requires plaintiffs to show more than the absence of proportional representation. In addition, it neither explicitly nor implicitly creates a defense to liability, nor does it establish the per se defense raised by the Appellees. In addition to the clear language of the proviso, the lengthy and authoritative legislative history accompanying the 1982 amendments discloses that Congress intended only to emphasize that minorities have no right to claim a proportional remedy, not to define a defense:

> This disclaimer is entirely consistent with . . . Supreme Court and Court of Appeals precedents, which contain similar statements regarding the absence of any right to proportional representation. It puts

to rest any concerns that have been voiced about racial quotas.

The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and elect candidates of their choice.

S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News.

The disclaimer portion of Section 2 was contained in an amendment offered by Senator Dole who explained the purpose of this language:

> The language of the subsection explicitly rejects, as did White [v. Regester, 412 U.S. 755 (1973)] and its progeny, the notion that members of a protected class have a right to be elected in numbers equal to their proportion of the population. The extent to which members of a protected class have been elected under the challenged practice or structure is just one factor, among the totality of circumstances to be considered, and is not dispositive.

1982 U.S. Code Cong. & Admin. News at 364. It is manifestly clear from the unambiguous legislative language and history that the true purpose behind the disclaimer was to clarify that minority groups could not assert a right to proportional representation. Any actual (or projected) minority electoral successes should be considered by a district court as "just one factor" in evaluating the totality of circumstances in a given case. As recently noted by Justice White in his dissenting opinion in Shaw v. Reno, No. 92-357, 1993 WL 224459 at *22, n.6 (U.S. June 28, 1993):[3]

> This is not to say that a group that has been afforded roughly proportional representation never can make out a claim of unconstitutional discrimination. Such districting might have both the intent and effect of "packing" members of the group so as to deprive them of any influence in other districts. Again, however, the equal protection inquiry should look at the group's overall influence over, and treatment by, elected representatives and the political process as a whole.

---

[3] In this passage, Justice White is citing established law, which was not affected by the majority's views in that case. See Thornburg v. Gingles, 478 U.S. 30, 74-77 (1986); Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992).

2. Section 2 may be violated even in the presence of proportional representation.

Even assuming the availability and proper proof of an affirmative defense of proportionality, a Section 2 violation may still be found. The Appellees' simplistic assertion that proportionality "must inevitably trump" the Gingles preconditions (Appellants' Brief 22) reveals a fundamental misunderstanding of the function and interpretation of the Voting Rights Act.

This Court has previously addressed the possibility that persistent proportional representation may not defeat a Section 2 claim. As Justice Brennan specifically warned in Gingles, "[i]n some situations, it may be possible for Section 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives. . . ." 487 U.S. at 77. In the instant case, not only was there no history of "sustained success" by Hispanics, but also there was unrebutted proof that the Hispanic minority's undiluted voting strength exceeded that provided for it by the state plan.

The essence of Justice Brennan's reasoning has been forcefully restated by the Seventh Circuit in Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992).

> We agree . . . that proportional representation does not automatically defeat claims under the Voting Rights Act -- not only because Justice Brennan's opinion says so, 478 U.S. at 74-76 . . . , but also because the statute gives to each person the right to political participation. . . . A balanced

> bottom line does not foreclose proof of discrimination along the way. . . . Just as the proviso . . . ensures that white candidates are free to compete for electoral success that exceeds the ratio of white voters, so blacks must be free to compete for favor; the Voting Rights Act neither sets nor tolerates a cap on their achievements.

Id. at 359 (emphasis added and citation omitted).

3. The Appellees failed to establish that the state's reapportionment plan provides for proportional representation in the State of Florida.

Even if proportional representation might provide a defense in some cases, the Appellees failed to establish such a defense in this case. The Appellees assert that they offered their proportionality defense at trial, and that the lower court "ignored this proportionality argument. . . ." Appellees' Brief 14. This contention is erroneous. In fact, in light of other evidence satisfying the liability preconditions of Thornburg v. Gingles, 478 U.S. 30 (1986), the district court's finding of liability, with its implicit rejection of the proportionality defense, actually demonstrates that Appellees failed to meet their burden of proof with respect to any proportionality defense.

The lower court relied not only upon findings regarding the Gingles preconditions, but also upon other determinative factual considerations. As a result of evidence adduced at the congressional portion of the trial, the lower court panel found, inter alia:

> A longstanding general history of official discrimination against minorities has influenced Florida's electoral process. . . . [R]acially polarized voting exists throughout Florida to varying degrees. The results of Florida's legislative elections over the past ten years established the presence of racially polarized voting. . . .
>
> In the state of Florida, minorities have had very little success in being elected to either the United States Congress or the Florida Legislature . . . .

De Grandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992).

These findings were adopted by the district court during the legislative trial and should not be disturbed on appeal.[4] Several of this Court's precedents have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Fed. R. Civ. P. 52(a). See, e.g., Rogers v. Lodge, 458 U.S. 613, 622-627 (1982); City of Rome v. United States, 446 U.S. 156, 183 (1980); White v. Regester, 412 U.S. 755, 765-770 (1973). Accordingly, the lower court's findings of vote dilution in South Florida overcome any asserted proportionality defense.

The Appellees' reliance on Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992), aff'd sub nom. African-American Voting Rights Legal Defense Fund, Inc. v. Blunt, 61 U.S.L.W. 3682 (April 5, 1993), to support their

[4] No appeal was taken from the district court's judgment implementing congressional districting, which includes these findings.

proportionality defense is misplaced. That case arose in a factual setting clearly distinguishable from the present case. Unlike the historical experience in Florida, the Nash court found evidence of a history of proportional representation, as well as a near certain likelihood that there would be such representation in the future. In this case, the De Grandy Appellants and the United States both challenged a statewide reapportionment plan that contained only three (out of 40) Senate seats with an Hispanic majority, or 7.5 percent. Because Hispanics in Florida comprise 11.73 percent of the statewide voting age population, under a truly proportional system, they would be entitled to control 4.7 seats. Thus, the challenged plan contains only 65% of the seats that true proportionality would provide.[5] For this reason, the Appellees cannot claim to have achieved proportional representation for Hispanics in the state Senate plan.

4. The state as a whole is the correct geographic area in which a court should evaluate a claimed defense of proportionality.

Following this Court's recent unanimous opinions in Voinovich v. Quilter, ___ U.S. ___, 113 S. Ct. 1149, 1157 (1993) and Growe v. Emison, ___ U.S. ___, 113 S. Ct. 1075, 1084 (1993), there is no longer any doubt that the Gingles preconditions apply in cases challenging single-member districts as well as multimember districts. See also Shaw v. Reno, No. 92-357, 1993 WL 224459 (U.S. June 28, 1993). While the analytical framework for establishing liability is the same for each type of case, there remains a distinction in the manner in which plaintiffs must

[5] The Appellants' plan (see n. 1 supra), with its four Hispanic seats, achieves 85% of true proportionality.

bring a claim, and a corresponding distinction in considering evidence of claimed proportionality.

With regard to a multimember districting system, Section 2 plaintiffs must challenge specific districts which they allege submerge minorities who, otherwise, could form a majority in one or more single-member districts. This was the approach of the plaintiffs in Gingles at the district court level, and as approved by this Court. See Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), and 478 U.S. 30 (1986). Application of the three preconditions identifies whether a violation exists with regard to a given multimember district. In analyzing liability, one of the considerations is whether the challenged multimember district has a history of "persistent proportional representation." Such a history may be a sufficient basis for finding that there is no Section 2 violation, as in the case of District 23 in Gingles. 478 U.S. 30, 77. On the other hand, as Justice Brennan noted in Gingles, even in the multimember district context, proportional representation may not foreclose a Section 2 challenge. As Senator Dole said, it is "just one factor" to be considered in the totality of the circumstances. S. Rep. No. 417, 97th Cong. 2d Sess. 31 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 364.

In a challenge to a single-member system, however, Section 2 plaintiffs face difficulties in proving that any particular district violates the Act. Such plaintiffs -- like the plaintiffs in the court below here -- must show that the system as a whole has been drawn in such a manner as to deprive minorities of an equal opportunity to participate in the electoral process.

Given equally populated districts, it could never be the case that, within a single-member district, a minority

group would be "sufficiently large" to form a majority in that single-member district. For the same reason, there cannot be any meaningful analysis of whether proportional representation has been achieved within single-member districts. As a result, the proportionality analysis -- again, "just one factor" in the totality of the circumstances -- is conducted with regard to the geographic area served by the political body in question, here statewide. This conclusion is entirely consistent with the fact that the challenged unit in a multimember district system -- the specific multimember district -- may be examined to determine whether sustained proportional representation from that district, along with the other factors in the totality of the circumstances, negate a finding that the plaintiffs have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 478 U.S. 30, 75 citing 42 U.S.C. § 1973(b).

Unless a minority group is entirely concentrated in one area of a state (which would be rare in any case, and certainly not true of Hispanics in Florida), the geographical compactness requirement of the three-pronged Gingles test will almost necessarily ensure that a plaintiff group will fail to achieve proportionality statewide. On the other hand, the fact that there will always be some significant non-minority population even in geographically compact majority/minority districts would doom that minority to perpetual underrepresentation statewide if proportionality were analyzed only in the area in which the minority was concentrated. For example, if (as in Florida) approximately 81% of the Hispanics are concentrated in Dade County but the remainder are so dispersed as to make the creation of Hispanic majority districts impossible elsewhere, the Appellees' reasoning would allow the Dade County area Hispanics to be packed into very highly concentrated

Hispanic districts (say 80%). Because there would still be 20% Anglo residents in those packed districts, however, a proportionality analysis which was confined to those districts would always "prove" that Hispanics were over-represented proportionally. Yet, such packing would be a clear violation of Section 2. And it is precisely such packing (although not to that degree) that caused the District Court to find liability with regard to the Senate plan in this case. The error was the court's failure to remedy it.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the case remanded to require a proper remedial hearing.

Respectfully submitted,

C. Allen Foster*
Robert N. Hunter, Jr.
Benjamin L. Ginsberg
Marshall R. Hurley
Patton, Boggs & Blow
P.O. Drawer 20004
Greensboro, NC 27420
(919) 273-1733

E. Thom Rumberger
George N. Meros, Jr.
Daniel J. Gerber
Rumberger, Kirk & Caldwell
P.O. Box 10507
Tallahassee, FL 32302
(904) 222-6550

Alberto R. Cardenas
Ferrell, Cardenas, Fertel & Morales
Suite 1930, Miami Center
201 South Biscayne Boulevard
Miami, FL 33131
(305) 371-8585

Counsel for Appellants
***Counsel of Record**

Supreme Court
FILED
APR 21 1993
OFFICE OF THE CLERK

Nos. 92-519, 92-593, 92-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF NEITHER PARTY

RUTH L. LANSNER
STEVEN M. FREEMAN
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

JOAN S. PEPPARD
ANTI-DEFAMATION LEAGUE
150 S.E. 2nd Avenue
Suite 800
Miami, Florida 33131
(305) 373-6306

CHESTERFIELD SMITH
MARTHA W. BARNETT
DAVID E. CARDWELL
SCOTT D. MAKAR *
LESLIE A. SHANKLIN
HOLLAND & KNIGHT
50 North Laura Street
Suite 3900
Jacksonville, Florida 32201
(904) 798-5400
Counsel for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a State-enacted reapportionment plan violates Section 2 of the Voting Rights Act because it does not maximize the electoral opportunities of a minority class in a geographic area of the State, even if the plan provides the minority class with an equal opportunity to participate in the political process and to elect candidates of its choice?

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	6
THE VOTING RIGHTS ACT SHOULD NOT BE INTERPRETED TO REQUIRE "SEPARATE BUT EQUAL" VOTING RIGHTS AND DISTRICTS, OR THE MAXIMIZATION OF THE NUMBER OF MAJORITY-MINORITY OR MINORITY-INFLUENCE DISTRICTS	6
A. Proof Of The *Gingles* Threshold Requirements Does Not Conclusively Establish A Section 2 Violation	10
B. The Proper Standard For A Violation Of Section 2 Is Whether A Challenged Reapportionment Plan Denies A Minority Class Equal Opportunities To Participate In The Political Process And Elect Candidates Of Its Choice	16
C. The Voting Rights Act Does Not Mandate The Creation Of The Maximum Number Of Majority-Minority Or Minority-Influence Districts	
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Boston Police Patrolmen's Ass'n, Inc. v. Castro, 461 U.S. 477 (1983) 2
Brown v. Board of Education, 347 U.S. 483 (1954) 2
Burton v. Sheheen, 793 F. Supp. 1329 (D.S.C. 1992) 6, 20
Cardona v. Power, 384 U.S. 672 (1966) 2
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 2
DeFunis v. Odegaard, 416 U.S. 312 (1974) 2
De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992) 20
Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 2
Fullilove v. Klutznick, 448 U.S. 448 (1980) 2
Growe v. Emison, —— U.S. ——, 113 S. Ct. 1075 (1993) 12
Jones v. Alfred H. Mayer, Co., 392 U.S. 409 (1968) 2
McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) 2
Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547 (1990) 2
NAACP v. New York, 413 U.S. 345 (1973) 9
Palmore v. Sidoti, 466 U.S. 429 (1984) 2
Regents of University of California v. Bakke, 438 U.S. 265 (1978) 2
Runyon v. McCrary, 427 U.S. 160 (1976) 2
Shelley v. Kraemer, 334 U.S. 1 (1948) 2
Solomon v. Liberty County, Fla., 899 F.2d 1012 (11th Cir. 1990) 11
Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 2
Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*
Turner v. State of Ark., 784 F. Supp. 553 (E.D. Ark. 1991), *aff'd*, —— U.S. ——, 112 S. Ct. 2296 (1992) 6
United Jewish Organizations v. Carey, 430 U.S. 197 (1977) 2, 8

TABLE OF AUTHORITIES—Continued

Page

United States Steelworkers v. Weber, 443 U.S. 193 (1979) 2
Voinovich v. Quilter, —— U.S. ——, 113 S. Ct. 1149 (1993) 11, 13
Wright v. Rockefeller, 376 U.S. 52 (1964) 7, 23
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 2

Statutes:

42 U.S.C.A. § 1973 (Supp. 1992) 11, 15
42 U.S.C.A. § 1973(b) (Supp. 1992) 8, 23
Art. III, § 16(a), FLA. CONST. 19

Miscellaneous:

Kathryn Abrams, *"Raising Politics Up": Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. LAW REV. 449 (1988) 14
Dana R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL'Y REV. 405 (1991) 13
BERNARD GROFMAN, LISA HANDLEY, & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY (1992) 9, 15, 17, 19
Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) 7
Charles Lane, *New York Newsday*, Sept. 10, 991) .. 6
Jack Quinn, Jonathan B. Sallet, and Donald J. Simon, *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON CIV. RIGHTS L.J. 207 (1990) 9
Sushma Soni, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651 (1990) 13

TABLE OF AUTHORITIES—Continued

Page

Rick G. Strange, *Application of the Voting Rights Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95 (1989) 20
U.S. Code Cong. & Admin. News 1982 9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-519

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

No. 92-593

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

No. 92-767

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

---

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith which is a national Jewish organization. The B'nai B'rith was founded in 1842 and estab-

lished its Anti-Defamation League as its educational arm in 1913.

The Anti-Defamation League was organized to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or the majority, and in assuring that each individual receives equal treatment under the law regardless of his or her race, ethnicity, or religion. The Anti-Defamation League takes the position that each person has a constitutional right to be judged on his or her individual merits, rather than as a component part of a particular racial or ethnic group.

Among its many activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *United States Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Assn'n, Inc. v. Castro*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990). More specifically, in the area of voting rights the Anti-Defamation League has filed *amicus* briefs in *United Jewish Organizations v. Carey*,

430 U.S. 197 (1977); and *Cardona v. Power*, 384 U.S. 672 (1966).

This brief is submitted because of the belief that our system of constitutional liberties is impaired when the law sanctions the use of race or ethnicity in the decision-making processes of governmental activities, except in certain circumstances where it is necessary to correct purposeful discrimination. The Anti-Defamation League regards as unsound the emerging principle under the Voting Rights Act that courts must automatically strive to create the maximum number of racial and ethnic voting districts to the exclusion of any other considerations. If this principle becomes the polestar under the Voting Rights Act, sanction will be given to compulsory electoral success for racial and ethnic minority classes, racial and ethnic divisiveness will intensify, and the process of popular elections on which our government rests will be seriously impeded.

SUMMARY OF THE ARGUMENT

The legitimacy of the Voting Rights Act hinges on the Court's decisions in these consolidated reapportionment cases. In the October 1992 term, the Court embarked on its first excursions into the application of amended section 2 of the Voting Rights Act to the reapportionment of single-member State legislative districts. As challenges involving multi-member districts decline and States reapportion their legislatures following the 1990 census, this Court will increasingly face serious questions regarding how the Voting Rights Act, the Constitution, and the quest for equality among all racial and ethnic classes are to be reconciled in single-member districts. The Court's answers to these questions will necessarily send powerful messages to every member of society regarding the values of our democratic form of government. The enduring principles this Court proclaims matter more than the results it may reach.

In this regard, three important principles are at the forefront in these consolidated cases. First, the Voting Rights Act should not be interpreted to require "separate but equal" districts for minority voters where such districts provide no greater opportunity for effective political participation or political influence. The Voting Rights Act was not intended to relegate racial, ethnic and language minorities to permanent minority status, which is the inevitable result of a fixation on race-based numerical goals. Instead, the Voting Rights Act must be interpreted and applied with the primary goal of rectifying discriminatory voting practices without an obsessive preoccupation with disproportionately magnifying race, ethnicity and language differences over all other factors.

Second, consistent with this principle, a violation of section 2 of the Voting Rights Act is not conclusively demonstrated simply because the three threshold requirements set forth in *Thornburg v. Gingles,* 478 U.S. 30 (1986),[1] are met in the State reapportionment context. The *Gingles* threshold requirements, if established, merely demonstrate that one or more *additional* majority-minority districts are *possible* in a geographic area under consideration. This bare possibility, however, is merely one piece of evidence of an asserted section 2 violation and is a beginning—not an end—to the inquiry. The statutory language of the Voting Rights Act mandates that a violation be demonstrated based on the "totality of the circumstances" such that all relevant factors must be carefully considered and balanced before concluding that a State-enacted reapportionment plan violates section 2. The standard for determining that a violation exists is whether a reapportionment plan results in minorities not having an equal opportunity to participate in the political process and to elect candidates of their choice. The *Gingles* threshold requirements do not, by themselves, answer this question.

[1] The Court determined that in order for a minority class to even assert a section 2 claim in the multimember district context it must prove (1) "it is sufficiently large and geographically compact to constitute a majority in a single member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . , usually to defeat the minority's preferred candidate." *Id.* at 50-51 & nn.16-17. In other words, the selection of a multimember electoral system cannot form the basis for a section 2 vote dilution claim if the minority class cannot even form a geographically compact and politically cohesive majority in a single member district.

Finally, the Voting Rights Act should not be interpreted to mandate the imposition of majority-minority (or minority-influence) districts merely because such districts can be computer-generated based solely on racial and ethnic criteria to the exclusion of all other relevant factors. Simply because a majority-minority (or minority-influence) district can be drawn does not mean it must be imposed. As these consolidated cases demonstrate, it is mathematically and topologically possible for voting districts to be drawn such that a racial or ethnic minority can control a majority of districts in a geographic region. A myopic focus on maximizing the number of voting districts based on racial and ethnic criteria leads to this distorted result. No racial or ethnic class is entitled to the maximum possible representation and nothing in the Voting Rights Act remotely supports such a policy.

ARGUMENT

THE VOTING RIGHTS ACT SHOULD NOT BE INTERPRETED TO REQUIRE "SEPARATE BUT EQUAL" VOTING RIGHTS AND DISTRICTS, OR THE MAXIMIZATION OF THE NUMBER OF MAJORITY-MINORITY OR MINORITY-INFLUENCE DISTRICTS

> The Voting Rights Act, once instrumental in overthrowing political apartheid in the South, is becoming a tool in the racial balkanization of American politics.[2]

The Anti-Defamation League supports the laudable concern for protecting the voting rights of all racial, ethnic and language minorities.[3] It supports and encourages efforts to effectively maintain and expand the political influence and voting rights of minorities in the body politic as a whole. The Anti-Defamation League fully supports the integration of all persons of all racial and ethnic backgrounds into contemporary political life, in Florida and throughout the nation. It also supports the principle that no racial or ethnic class is guaranteed either representation proportionate to its makeup in the population or the maximum representation possible.

---

[2] *Turner v. State of Ark.*, 784 F. Supp. 553, 561 (E.D. Ark. 1991) (quoting Charles Lane, *New York Newsday*, Sept. 10, 1991, p. 40), *aff'd*, —— U.S. ——, 112 S. Ct. 2296 (1992).

[3] The Anti-Defamation League has considerable disagreement with the practice of grouping racial and ethnic minorities under common labels such as "Hispanic" or "African-American." This racial and ethnic grouping unfairly equates the color of one's skin with a community of interest and creates unjustified stereotypes of culturally diverse minorities. While many racial and ethnic minorities shrare a common history and culture, the color of one's skin alone does not create the community of interest. Instead, a "community's views on crime, employment, education, police brutality, urban sprawl, and urban blight, may be just as indicative of a community of interest as whether the members of the community are predominantly black or white." *Burton v. Sheheen*, 793 F. Supp. 1329, 1357 (D.S.C. 1992).

But the Anti-Defamation League vigorously opposes an interpretation of the Voting Rights Act that results in "separate but equal" voting rights and districts for minorities.[4] The integration ideal can not be realized under a system where minorities achieve political power through political and geographic segregation. Political candidates must be evaluated on their merits—not their race—and it should be possible for minority voters not only to elect candidates of their choice but for minority candidates to be elected in numbers equal to or greater than their proportion in the population.[5] These ideals become unattainable if racial and ethnic minorities become automatically entitled to "separate but equal" districts under the calculus of the Voting Rights Act.[6]

---

[4] " 'Separate but equal' and 'separate but better off' have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public." *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

[5] For this reason, the Anti-Defamation League views with disfavor the concept that "representatives of choice" or "minority-preferred candidates" must necessarily be of the same racial or ethnic background as the minority class at issue.

[6] The conventional litigation strategy under the Voting Rights Act focuses on the election of minority representatives who will thereby represent minority interests and be spokespersons for political equality. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1078 (1991). This preoccupation with electoral success "stifles rather than empowers" minority political participation. *Id.* at 1079. It may result in the election of more minority officials, but it ignores "broadening the base of participation and fundamentally reforming the substance of political decisions." *Id.* at 1080. It also "assumes that majority winners rule legitimately, even where such rule leads to permanent minority losers." *Id.* For example:

> [B]lack electoral success theory simply reconfigures winner-take-all electoral opportunities into geographically based, majority-black, single-member districts. Representing a geographically and socially isolated constituency in a racially

Race and ethnicity necessarily play a role in both the liability and remedy stages of a Voting Rights Act claim.[7] A concern for minority voting rights, however, should not automatically result in the imposition of ill-conceived and bizarre-shaped voting districts into which racial, ethnic and language minorities are herded to meet some artificially-imposed numerical goals. Such a reflexive response ignores any consideration of whether existing communities of minority voters, who are currently able to exercise effective political influence, would be disenfranchised by creation of a majority-minority (or minority-influence) district. This type of "remedy" also violates the mandate of the Voting Rights Act that racial and ethnic minorities need not be elected in numbers equal to their proportion in the population.[8] Further, the mechanical imposition of majority-minority (or minority-influence) districts can pervert the Voting Rights Act by allowing minority classes to achieve disproportionately *greater* political strength than is otherwise justified based on the totality of all relevant circumstances.

The Voting Rights Act is a conflict of visions and reflects an untenable compromise between opposing policy

---

polarized environment, blacks elected from single-member districts have little control over policy choices made by their white counterparts. Thus, although it ensures more representatives, district-based black electoral success may not necessarily result in more responsive government.

Id. Finally, minority electoral success "romanticizes" minority elected officials as "empowerment role models" and thereby ignores problems of "tokenism" and a false sense of "equality of opportunity." *Id.* at 1079-80.

[7] *See, e.g., United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (no *per se* rule against using racial factors in districting and apportionment under Fourteenth and Fifteenth Amendments) (White, J., joined by Stevens, J., Brennan, J., and Blackmun, J., with Stewart, J., and Powell, J., concurring in the judgment).

[8] The Voting Rights Act does not establish "a right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. § 1973(b) (Supp. 1992).

perspectives. For this reason, its interpretation is "not an easy task." *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986), (O'Connor, concurring). Congress enacted section 2 of the Voting Rights Act to help achieve the Fifteenth Amendment's guarantee that no citizen's right to vote is "denied or abridged . . . on account of race, color, or previous condition of servitude." *NAACP v. New York*, 413 U.S. 345, 350 (1973). Much has been written about the history leading to the Act's adoption in 1965 and its amendment in 1982 to implement a "results" rather than "intent" test (including the legislative intent of the 1982 amendments).[9]

Despite the body of scholarship on the Act and its purpose, no consensus has formed on a single standard for determining liability under section 2. Instead, reasonable minds disagree. The Anti-Defamation League believes, however, that the right question to ask is whether " 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.' " *Gingles*, 478 at 44 (quoting from U.S. Code Cong. & Admin. News 1982, p. 206). The right question in these consolidated cases, therefore, is whether the State of Florida's reapportionment plans for its Senate and House, Senate Joint Resolution 2-G, result in the defined minority classes having less than an equal opportunity to participate in the political process or elect candidates they support.

---

[9] U.S. Code Cong. & Admin. News 1982, pp. 192-221 (legislative history of amendment to section 2); *see generally* BERNARD GROFMAN, LISA HANDLEY, & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 38-42 (1992) (review of 1982 amendments and legislative history) (hereafter QUEST FOR VOTING EQUALITY); Jack Quinn, Jonathan B. Sallet, and Donald J. Simon, *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON CIV. RIGHTS L.J. 207 (1990) (discussion of case law and issues arising since the 1982 amendments).

This ultimate question raises a host of intermediate questions. The first is whether proof of the *Gingles* threshold requirements conclusively establishes liability under section 2 in the State reapportionment context. A related question is what standard or measure of minority voting strength is relevant in determining whether a challenged reapportionment plan denies a minority class equal opportunities to participate in the political process and elect candidates of its choice. Another is whether the maximum number of majority-minority (or minority-influence) district must automatically be imposed as a remedy for a section 2 violation.

The answers to these methodological questions are complex but certain principles are discernable. First, in determining whether a section 2 violation has occurred *all* relevant factors must be assessed—not just the three *Gingles* threshold factors. Second, the standard by which to gauge a State's reapportionment plan is not a hypothetical plan that maximizes the number of majority-minority (or minority influence) districts or a plan that provides proportional representation. Instead, the standard is set forth in the Voting Rights Act and *Gingles*: whether based on the totality of the circumstances the State's plan would cause a minority class to have less than an equal opportunity to participate in the political process or elect candidates they support. Finally, the Voting Rights Act does not sanction the maximization of the number of majority-minority (or minority-influence) districts. Federal courts should be extremely hesitant to impose additional majority-minority (or minority-influence) districts where a minority class already has a meaningful opportunity to participate in the political process and elect representatives sensitive to its concerns.

A. Proof Of The *Gingles* Threshold Requirements Does Not Conclusively Establish A Section 2 Violation

A fundamental question is whether a violation of section 2 of the Voting Rights Act is conclusively demonstrated simply because the three threshold requirements of *Thornburg v. Gingles* are met in the reapportionment context.[10] The Anti-Defamation League respectfully suggests that it is not.

First, and most importantly, the statutory language of section 2 requires that a "totality of the circumstances" test be used to determine whether a violation has occurred.

> A violation . . . is established if, *based on the totality of the circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C.A. § 1973 (Supp. 1992) (emphasis added). It cannot be seriously argued that the three-part *Gingles* test encompasses the entire range of factors that Congress intended under a "totality of the circumstances" approach. For this reason alone, the *Gingles* prerequisites are insufficient to establish a violation.[11]

---

[10] The Eleventh Circuit's equally divided opinion in *Solomon v. Liberty County, Fla.*, 899 F.2d 1012 (11th Cir. 1990) (en banc), demonstrates the polar positions on this issue. The court split on whether the *Gingles* threshold criteria, if proven, conclusively demonstrate a violation. Five judges supported the position that satisfying the three *Gingles* criteria under the circumstances presented was sufficient to establish a section 2 violation. *Id.* at 1021 (plaintiffs "met all three *Gingles* requirement. This is all the Supreme Court requires, and I may require no more."). Five other judges rejected a "mechanical interpretation" of section 2 and contended that proof of the *Gingles* requirements does not invariably establish a violation. *Id.* at 1035.

[11] *See Gingles*, 478 U.S. at 46 ("Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process."); *Voinovich v. Quilter*, —— U.S

Second, the *Gingles* threshold criteria are a methodology for analyzing whether a plaintiff minority class has a viable—not necessarily a successful—section 2 claim. The *Gingles* test is an initial hurdle or precondition, not a finding of ultimate liability. The question in *Gingles* was whether the minority plaintiffs' "ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure." 478 U.S. at 46 n.12 (emphasis in original). Unless minority voters possess the potential to elect representatives in the absence of the challenged multi-member structure, they can not claim to have been injured by the State's use of multi-member districts. *Id.* at 50 n.17.

The argument is similar in the reapportionment context. A minority class cannot claim that a reapportionment plan violates section 2 unless, as a precondition, the minority class can demonstrate that the plan has the *potential* to be discriminatory because it submerges or fragments a geographically compact and politically cohesive minority class that could otherwise form a majority in a single member district.[12] Proof of the three thresh-

---

——, 113 S. Ct. 1149, 1157 (1993) ("plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class.").

[12] The three *Gingles* prerequisites are relevant threshold requirements in establishing a vote-fragmentation claim with respect to single member districts. *Growe v. Emison*, —— U.S. ——, 113 S. Ct. 1075 (1993).

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district[.] And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population[.] Unless these points are established, there neither has been a wrong nor can be a remedy.

113 S. Ct. at 1084 (citations and footnote omitted).

old requirements merely demonstrates that a State could have drawn one or more additional majority-minority districts in a particular geographic region. This inquiry merely answers the question whether a State's plan *could* be violative of section 2. The *Gingles* threshold factors, if proven, begin consideration of the "totality of the circumstances"—they do not end the inquiry. For this reason, a plaintiff's burden is not met by using the *Gingles* threshold requirements as an evidentiary shortcut to ultimate liability.[13]

Finally, the *Gingles* preconditions, by themselves, create perverse incentives that detract from the integration ideal. The requirement of a "sufficiently large and geographically compact" minority makes racial segregation a prerequisite for a voting rights violation.[14] The requirement of racially polarized voting lessens the prospects of long term cross-racial political unity. The concept of a "minority-preferred candidate" adds legitimacy to the stereotype that only a minority can represent minority interests and that minorities are preoccupied with race and ethnicity and have little concern for other pressing social, economic and political issues.[15] Simply stated, the *Gingles* test institutionalizes an entitlement to distinct racial and

---

[13] The burden of proving a violation of section 2 is "squarely on the plaintiff's shoulders." *Voinovich v. Quilter*, —— U.S. ——, 113 S. Ct. 1149, 1156 (1993).

[14] *See* Dona R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL'Y REV. 405, 407 (1991).

[15] The concept has resulted in considerable disagreement regarding whether the race of a "minority-preferred" candidate is a proper consideration under section 2 analysis. *See* Sushma Soni, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651 (1990) (analyzing various approaches and suggesting that the race of minority-preferred candidates is properly considered as a factor in determining a section 2 violation).

ethnic districts and perpetuates the notion that minorities have "separate but equal" voting rights.[16]

In summary, determining whether a State's reapportionment plan violates section 2 of the Voting Rights Act necessitates a probing and thoughtful consideration of numerous historical, social, economic, legal and political factors. The Voting Rights Act recognizes the complexity of this inquiry and requires that an asserted violation be based on the "totality of the circumstances." The three *Gingles* threshold requirements, however, do not encompass the "totality of circumstances" and thereby cannot conclusively establish liability. Instead, they merely demonstrate that plaintiffs present a *viable* section 2 claim.

B. The Proper Standard For A Violation Of Section 2 Is Whether A Challenged Reapportionment Plan Denies A Minority Class Equal Opportunities To Participate In The Political Process And Elect Candidates Of Its Choice

The next step in determining whether a State's reapportionment plan violates section 2 requires a comparison of the State's plan against some standard of "undiluted" or "unfragmented" minority voting strength. Various standards of minority voting strength exist such as hypothetical plans that provide either proportionate representation or maximum feasible voting strength.[17]

---

[16] In addition, litigation since *Gingles* has unnecessarily focused on minority electoral success as the singular measure of minority political achievement. The "opportunity to elect candidates, while important, is not the sole or even the most crucial element of political efficacy. Important political goals such as expression of preferences and alteration of substantive policies are accomplished not simply by pulling a lever, but by engaging in activities such as discussion, lobbying, and coalition-building with others." Kathryn Abrams, *"Raising Politics Up": Political Participation and Section 2 of the Voting Rights Act*. 63 N.Y.U. LAW REV. 449, 452 (1988).

[17] *See Gingles*, 478 U.S. at 88-99 (discussion of various measures of "undiluted" voting strength including "maximum feasible voting strength" stnadard) (O'Connor, J., concurring in judgment); *see also*, QUEST FOR VOTING EQUALITY, *supra* note 9, at 124-28 (discussion of standards other than single member districts such as single-nontransferable voting systems, semiproportional systems, power sharing devices, etc.).

The choice of standards is important because, to a great extent, the standard for determining liability becomes the standard for relief. For instance, if a State's plan is compared with, and falls short of, a standard that provides for maximum possible minority voting strength, a district court may become more inclined to find a section 2 violation and impose the standard used as the appropriate remedy.

The problem is that once the *Gingles* criteria are met, it becomes tempting for district courts to place inordinate or conclusive weight on them in determining section 2 liability. This approach unjustifiably reduces a probing inquiry into all relevant factors into an examination of whether another majority-minority district could be drawn. This seriously misinterprets *Gingles* and the Voting Rights Act. A methodology that fixates on providing maximum possible minority representation or mathematically equivalent representation is flawed because the Voting Rights Act does not guarantee any racial or ethnic class either maximum feasible voting strength or proportionate representation.

Instead, the appropriate standard is whether a State's challenged reapportionment plan provides an equal opportunity to all racial and ethnic classes to participate in the political process and elect candidates of their choice.[18] In applying this standard, it may be permissible for litigants to compare a State's plan with hypothetical plans that provide for proportionate or maximum feasible voting strength. States should be permitted to defend their plans against such standards. But the legal standard must ultimately be whether based on the totality of the cir-

---

[18] 42 U.S.C.A. § 1978 (Supp. 1992); *Gingles*, 478 U.S. at 44.

cumstances a State's plan provides racial and ethnic minority classes with equal opportunities to participate in the political process and elect candidates of their choice. A State's plan may provide these opportunities even if the *Gingles* threshold criteria are established and additional majority-minority (or minority-influence) districts are possible.

C. The Voting Rights Act Does Not Mandate the Creation Of The Maximum Number Of Majority-Minority Or Minority-Influence Districts

Undue reliance on the *Gingles* threshold criteria can result in a misguided liability and remedial standard: the maximization of the number of minority-controlled districts. The Voting Rights Act, however, does not mandate the imposition of majority-minority (or minority-influence) districts merely because such districts can be computer-generated based solely on racial and ethnic criteria without due consideration of other relevant factors. The fact an additional majority-minority (or minority-influence) district can be drawn does not mean it should be imposed, particularly where a minority class has meaningful representation in its geographic area. The holding in *Gingles* should not result "in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." *Gingles*, 478 U.S. at 85 (O'Connor, J., concurring).

Similarly, there is no right to the maximum feasible representation in favor of racial and ethnic minority classes. It is mathematically and topologically possible for voting districts to be drawn, as these consolidated cases demonstrate, such that a racial or ethnic minority can have effective control of more than a majority of districts. A myopic focus on maximizing the number of voting districts of geographically and politically cohesive

racial and ethnic minorities leads to this distorted result. Nothing in the Voting Rights Act remotely supports such a policy.

A simple mathematical example demonstrates how the maximization principle leads to unwarranted results.[19] Suppose state X has a population of 100,000 and 10 Senate districts (10,000 persons per district). State X's population includes 40,000 persons comprising a single "politically cohesive" minority class. State X enacts a Senate plan providing for ten districts, four of which are geographically compact "safe" minority districts as set forth in Table 1.[20]

TABLE 1

STATE X'S SENATE PLAN #1

District	Non-Minority	Minority
1	3,500	6,500*
2	3,500	6,500*
3	3,500	6,500*
4	3,500	6,500*
5	7,500*	2,500
6	7,500*	2,500
7	7,500*	2,500
8	7,500*	2,500
9	7,500*	2,500
10	8,500*	1,500
TOTAL	60,000	40,000

[19] The examples presented are structured around a fictitious State X, but could just as easily represent a limited geographic region within State X. The principles the examples illustrate, therefore, can be applied to portions of a reapportionment plan limited to a particular geographic area or region of a State.

[20] For purposes of this example, a "safe" minority district requires that 65% of its voting age population be from the minority class. *E.g.*, Districts 1-4 in Table 4. For an overview of the 65 percent rule, *see*, QUEST FOR VOTING EQUALITY, *supra* note 9, at 120-121.

State X's Senate plan provides a meaningful opportunity for the minority class to elect candidates of its choice in four districts, and does not disenfranchise the minority class in the remaining six districts. Instead, the minority class has some degree of influence in the remaining districts, such that candidates cannot entirely ignore the minority class' interests.

An alternative plan that maximizes the number of "safe" majority-minority districts is set forth in Table 2.

TABLE 2

SENATE PLAN #2

District	Non-Minority	Minority
1	3,333	6,667*
2	3,333	6,667*
3	3,333	6,667*
4	3,333	6,667*
5	3,333	6,667*
6	3,335	6,665*
7	10,000*	0
8	10,000*	0
9	10,000*	0
10	10,000*	0
TOTAL	60,000	40,000

This alternative plan provides the minority class with the opportunity of electing candidates of its choice in six districts, thereby having a super-majority of representatives in State X's Senate despite constituting a minority of the population. This plan diminishes the Non-Minority class' voting rights and entirely disenfranchises minority influence in four districts. Needless to say, such a plan would more likely paralyze rather than promote the progress of racial or ethnic harmony in State X.

The type of plan depicted in Table 2, however, results from the unidimensional focus on maximizing the number of racial or ethnic majority-minority districts. The geographically compact requirement of *Gingles*, of course, may somewhat reduce the number of possible majority-minority districts in State X.[21] Nonetheless, the point remains that the maximaztion principle can, and will in many instances, result in disproportionately greater representation than is otherwise justified.

This maximization principle has an unspoken corollary: the minimization of the majority class' voting opportunities. The goal of maximizing the number of majority-minority districts reflects a willingness to minimize the number of majority-majority districts. In Florida, reapportionment is a zero sum game. The number of districts is constitutionally capped at the current numbers of 40 and 120 for Senate and House districts, respectively. Art. III, § 16(a), FLA. CONST. Each additional district crafted for a minority class is one less district for another minority class or the non-minority class. An increase in the number of majority-minority districts, of course, is justified if necessary to rectify a State's failure to provide the minority class with equal opportunities to participate in the political process and elect candidates of its choice. But no sound interpretation of the Voting Rights Act supports the automatic maximization or minimization of any race or ethnic class' voting opportunities.

Maximization neglects other important values. Districts that attempt to whittle out majority-minority and minority-influence districts often merely "bleach" minority voters from surrounding districts in which they have exercised some influence and compartmentalize them into a "separate but equal" district. Maximization can lead to the creation of bizarre-shaped districts linking enclaves of mi-

[21] The compactness requirement, however, has become of relatively inconsequential importance in drawing minority-controlled districts. *See* QUEST FOR VOTING EQUALITY, *supra* note 9, at 64-65 (noting "the extraordinary ingenuity of mapmakers, aided by computers and geographically-based census files, has already produced new districts for the 1990s that surpass almost any earlier district in degree of contortion.").

nority voters from distant communities that are so geographically spread out that there is no sense of community or commonality.[22] These districts may be unmanageable from the standpoint of constituent services.[23] Such districts can become so convoluted that members and representatives can scarcely tell who actually lives in their respective districts.[24]

Maximization also leads to the gerrymandering of diverse geographic and political interests into districts without a commonality of interest. Maximization may merely move minority voters to districts where they can be packed together to increase their numbers, and presumably their influence, while reducing their overall influence. Simply because a majority-minority or minority-influence district can be theoretically drawn, often it will not satisfy the requirement that the district be geographically compact.[25] For this reason, minority populations should not be haphazardly joined together as the automatic, reflexive, or even preferred response to achieving the desirable mandate of the Voting Rights Act.

Further, as the racial and ethnic composition of a State becomes larger and more diverse the maximization principle crumbles under its own weight.[26] Suppose that State

[22] *See Burton v. Sheheen*, 793 F. Supp. 1329, 1356 (D.S.C. 1992).

[23] *Id.*

[24] *Id.* As District Judge Roger Vinson stated regarding Florida's Congressional reapportionment plan, "[p]erhaps most importantly, I do not believe that these districts will make sense among the public. They appear to be something created by Governor Elbridge Gerry." *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1092 (N.D. Fla. 1992) (Vinson, J., concurring).

[25] "Without some objective geographical compactness standard to evaluate districts, the potential for future abuse in crafting district boundaries is virtually unlimited." *Id.* (Vinson, J., concurring).

[26] Other significant issues also arise as a population becomes more racially and ethnically diverse. *See* Rick G. Strange, *Application of the Voting Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95 (1989) (discussion of various issues such as whether distinct racial and ethnic minority groups can be aggregated for purposes of *Gingles* threshold requirements).

X's population is comprised of *two* politically cohesive minority classes of 40,000 (Minority 1) and 20,000 (Minority 2), respectively. Also, State X's population is dispersed such that no members of Minorities 1 and 2 are located in a region of the State that has a Non-Minority population of 20,000 thereby requiring the establishment of two Non-Minority districts. Two alternative and mutually exclusive plans that maximize the number of "safe" majority-minority districts for Minorities 1 and 2 are set forth in Table 3.[27]

TABLE 3

ALTERNATIVE SENATE PLANS #3/#4

District	Non-Minority Plan #3/#4	Minority 1 Plan #3/#4	Minority 2 Plan #3/#4
1	2,000 / 3,333	8,000*/ 6,667*	0/0
2	2,000 / 3,333	8,000*/ 6,667*	0/0
3	2,000 / 3,333	8,000*/ 6,667*	0/0
4	2,000 / 3,333	8,000*/ 6,667*	0/0
5	2,000 / 3,333	8,000*/ 6,667*	0/0
6	3,334 / 3,335	0 / 6,665*	6,666*/0
7	3,333 / 0	0 /0	6,667*/10,000*
8	3,333 / 0	0 /0	6,667*/10,000*
9	10,000*/10,000*	0 /0	0 /0
10	10,000*/10,000*	0 /0	0 /0
TOTAL	40,000 /40,000	40,000 /40,000	20,000 /20,000
# of Safe Districts	2/2	5/6*	3*/2

Under these circumstances, a complex and irreconcilable situation results if Minority 1 claims entitlement to six "safe" seats (under Plan 4) and Minority 2 claims entitlement to three "safe" seats (under Plan 3). The total of

[27] For purposes of this example, a "safe" district for Minority 1 or Minority 2 requires that 65% of its voting age population be from the particular minority class.

nine seats claimed exceeds the eight available.[28] The maximization principle loses its virtue at this point because no principled basis can explain why Minority 1 or Minority 2 should be entitled to the additional district to add to their already supra-proportional representation in State X.[29] The legitimacy of the maximization principle quickly deteriorates as the number of racial and ethnic classes increases, each demanding their own districts from the limited number available.

Finally, an important question is whether racial and ethnic proportionality on a statewide or regional basis are proper considerations in determining a violation of, or remedy under, section 2. For example, suppose a minority class constitutes 10% of a State's voting age population, half of which is dispersed throughout the State such that the *Gingles* threshold criteria cannot be met in those areas. The other half is concentrated primarily in a densely populated urban area of the State where it constitutes 50% of the voting age population and can form a geographically compact and politically cohesive majority in more than 50% of the area's legislative districts.

Under these circumstances, must the State attempt to provide the minority class with control of 10% of legislative districts on a statewide basis, despite the minority's inability to meet the *Gingles* threshold requirements

[28] This is the type of conflict of minority interests that the District Court confronted in reviewing the Senate and House Plans in the Dade County area.

[29] Complicating matters further, Minority 1 could be deemed the "majority" class in the remainder of State X because it has 40,000 of the 80,000 population to be apportioned among the eight districts. The "Non-Minority" class could be deemed a minority class, along with Minority 2, because each have only 20,000 of the 80,000 population to be apportioned and each could claim entitlement to three "safe" seats. The maximization principle, therefore, muddles rather than enlightens the determination of which of the racial classes are entitled to the eight seats.

throughout most of the State? Does a State plan that provides for proportional representation in the urban area, but not statewide, violate section 2? Does the minority class have a claim to additional, super-majority districts in the urban area in order to achieve statewide proportionality? The answers to these questions are self-evident.

It is axiomatic that there is no right to racially or ethnically proportional representation on either a statewide or regional basis. The text of the Voting Rights Act clearly provides there is no "right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. § 1973(b) (Supp. 1992). It will invariably be the case that racial and ethnic minorities cannot establish the *Gingles* threshold criteria throughout many parts of a State because they are not sufficiently numerous to constitute a majority in a geographically compact district. This fact does not grant to members of the minority class in another part of the State, where the *Gingles* threshold criteria can be met, a claim to disproportionately greater representation to achieve statewide racial balance.

CONCLUSION

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.[30]

The Anti-Defamation League recognizes the need to remedy purposeful discrimination, and supports the principles that motivated the initial enactment of the

[30] *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

Voting Rights Act. The Anti-Defamation League, however, strongly opposes the notion that each racial and ethnic group in America has a right to electoral success in a prescribed number of seats in government. Such a result is contrary to the fundamental democratic principles upon which our Constitution and the Voting Rights Act are founded. Guaranteeing proportional or maximum minority electoral success is misguided, and is a certain step down the path to racial and ethnic political separatism. Discrimination and deliberate denial of voting opportunity are evils that justify a remedy. But political segregation for racial and ethnic minorities cannot conquer these evils in the long term. True racial equality cannot be realized in "separate but equal" representative systems. The Anti-Defamation League therefore respectfully asks that this Court interpret the Voting Rights Act in these consolidated cases in accordance with the principle and purpose for which it was enacted; equality of political opportunity.

Respectfully submitted,

RUTH L. LANSNER
STEVEN M. FREEMAN
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017
(212) 490-2525

JOAN S. PEPPARD
ANTI-DEFAMATION LEAGUE
150 S.E. 2nd Avenue
Suite 800
Miami, Florida 33131
(305) 373-6306

CHESTERFIELD SMITH
MARTHA W. BARNETT
DAVID E. CARDWELL
SCOTT D. MAKAR *
LESLIE A. SHANKLIN
HOLLAND & KNIGHT
50 North Laura Street
Suite 3900
Jacksonville, Florida 32201
(904) 798-5400
Counsel for Amicus Curiae

* Counsel of Record

[redacted]

October Term, 1965

MICHEL DU GRAMONT, *et al.*,
Appellants,
v.
DOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Northern District of Florida

[redacted]

[redacted]

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. BECAUSE THE FLORIDA PLAN AFFORDS HISPANICS PROPORTIONAL REPRESENTATION, APPELLANTS' CLAIM FAILS AS A MATTER OF LAW	7
II. UNDER THE CONTROLLING LEGAL STANDARD, APPELLANTS HAVE NOT DEMONSTRATED, AND COULD NOT DEMONSTRATE, A VALID SECTION 2 CLAIM	11
A. Section 2 Does Not Require a State Legislature to Maximize the Number of Majority-Minority Districts	11
B. Appellants' Failure To Demonstrate That They Were Denied An Equal Opportunity To Participate In The Political Process Bars Their Section 2 Claim	16
1. Proof that a Covered Class is Denied An Equal Opportunity to Participate In The Electoral Process is a Prerequisite to Relief under Section 2	17
2. Appellants Have Not Demonstrated That The Florida Plan Denied Them An Equal Opportunity To Participate in the Electoral Process	26
CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page
Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3771 (U.S. May 17, 1993)	7
Black Voters v. McDonough, 565 F.2d 1 (1977)	24
Burns v. Richardson, 384 U.S. 73 (1966)	10, 11
Chapman v. Meier, 420 U.S. 1 (1971)	7
Chisom v. Roemer, 111 S. Ct. 2354 (1991)	5, 18
City of Mobile v. Bolden, 446 U.S. 55 (1982)	20
City of Rome v. United States, 446 U.S. 156 (1980)	10
David v. Garrison, 553 F.2d 923 (5th Cir. 1977)	25
Davis v. Bandemer, 478 U.S. 109 (1986)	*passim*
Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976)	24
Gaffney v. Cummings, 412 U.S. 735 (1973)	3, 10, 12
Growe v. Emison, 113 S. Ct. 1075 (1993)	*passim*
Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977)	24
Karcher v. Daggett, 462 U.S. 725 (1983)	12
Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992), *aff'd mem.*, 113 S. Ct. 1809 (1993)	8, 14
In re Reapportionment Law, 414 So. 2d 1040 (Fla. 1982)	27
Thornburg v. Gingles, 478 U.S. 30 (1978)	*passim*
United Jewish Organizations v. Carey, 430 U.S. 144 (1977)	12
United States v. Board of Supervisors, 571 F.2d 951 (5th Cir. 1978)	12
Upham v. Seamon, 456 U.S. 37 (1982)	2
Voinovich v. Quilter, 113 S. Ct. 1149 (1993)	*passim*
Whitcomb v. Chavis, 403 U.S. 148 (1971)	*passim*
White v. Regester, 412 U.S. 755 (1973)	*passim*
White v. Weiser, 412 U.S. 783 (1973)	2, 3
Wise v. Lipscomb, 437 U.S. 535 (1978)	2
Wyche v. Madison Parish Police Jury, 635 F.2d 1151 (5th Cir. 1981)	10

TABLE OF AUTHORITIES—Continued

Statutes	Page
42 U.S.C. § 1973 (1988)	*passim*
Fed. R. Ev. 201(f)	10
Miscellaneous	
A. Thernstrom, *Whose Votes Count?, Affirmative Action and Minority Voting Rights* (1987)	26
S. Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 177	*passim*
Voting Rights Act: Hearings on S.53, S.1761, S.1975, S.1992, ad H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 810 (1982)	5, 20, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Nos. 92-593, 92-767

MIGUEL DE GRANDY, *et al.*,
Appellants,

v.

BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

v.

STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

---

BRIEF AMICI CURIAE OF GRANT WOODS, ATTORNEY GENERAL OF ARIZONA, MICHAEL J. BOWERS, ATTORNEY GENERAL OF GEORGIA, MIKE MOORE, ATTORNEY GENERAL OF MISSISSIPPI, ERNEST D. PREATE, JR., ATTORNEY GENERAL OF PENNSYLVANIA, AND CHARLES W. BURSON, ATTORNEY GENERAL OF TENNESSEE, IN SUPPORT OF APPELLEES IN CASE NOS. 92-593 AND 92-767

INTEREST OF AMICI

The States of Arizona, Georgia, Mississippi, Pennsylvania and Tennessee, like all other States, must reapportion their legislative districts following each decennial

census.[1] In undertaking this complex task, these States are committed to the letter and spirit of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1988), and, in particular, to its guiding premise that all citizens should have an equal opportunity to participate meaningfully in the electoral process. At the same time, these States' first-hand experience confirms that reapportionment is a complex and intensely political process in which the necessary accommodation of a host of political, demographic, and legal concerns precludes the view that there is any single "right" approach.

The instant case is important to these *Amici* because it presents the opportunity to resolve basic Section 2 issues that implicate their ability to exercise one of the most sovereign of all powers—the drawing of political districts. In particular, this case provides an important occasion to clarify that, for all of its laudable goals, Section 2 does not authorize courts to impose an absolute requirement that States maximize the representation of any particular group or to divest States of their constitutionally grounded discretion to strike a reasonable, good-faith balance among competing political and social concerns.

SUMMARY OF ARGUMENT

This case implicates two concerns of fundamental importance. The first is the profound national commitment, given voice in both the Fifteenth Amendment and the Voting Rights Act, that all citizens have an equal opportunity to participate in the electoral process and elect representatives of choice. The second is the equally basic proposition that "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 113 S. Ct. 1075, 1076 (1993) (citing U.S. Const. Art I. Sec. 2).[2] Lying at the core of a State's

[1] The parties have consented to the participation of *Amici*; letters of consent are on file with the Clerk of this Court.

[2] *See also Upham v. Seamon*, 456 U.S. 37, 43 (1982), *reh'g denied*, 456 U.S. 938 (1982); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *White v. Weiser*, 412 U.S. 783, 794-95 (1973).

sovereignty, the reapportionment process necessarily involves intensely local concerns and must accommodate a multitude of competing social, political, regional, and ethnic interests. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (noting that "political considerations are inseparable" from this process).[3]

Amici believe that the court below has fundamentally misunderstood the interrelationship between these parallel national objectives. Purporting to apply the standard announced in *Thornburg v. Gingles*, 478 U.S. 30 (1978), the court held that Florida's carefully considered legislative reapportionment plan violated Section 2 of the Voting Rights Act because it provided for three majority Hispanic Senate districts instead of four and because it provided for two majority African-American districts instead of three. Similarly, the court found liability on the House side "in that more than nine Hispanic districts [could] be drawn without having or creating a regressive effect on black voters" in Dade County. Tr. VIII, 82, App. 203a. Put differently, notwithstanding the state legislature's comprehensive efforts to develop a rational apportionment plan that fairly accommodated Florida's ethnic diversity, explosive population growth, and complex political alignments—and notwithstanding the undisputed fact that those efforts were undertaken with an acute awareness of the legislature's responsibilities under the Voting Rights Act and with the active participation of representatives of every major ethnic group in the State—the court held the plan illegal because it provided fewer than the maximum number of possible Hispanic districts.

For several reasons, the court's liability determinations were plainly in error.[4] First, and dispositively, in the ab-

[3] *See also Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973); *White v. Weiser*, 412 U.S. at 794-95.

[4] In the judgment entered July 2, 1992, the court held that "[t]he State of Florida's state senatorial districts embodied in the 1992

sence of proof of intentional discrimination—which is not even remotely present here—persistent proportional representation is a complete defense to a Section 2 vote-dilution claim. That standard is plainly satisfied here. Thus, on the Senate side, it is uncontested that the plan affords both Hispanics and African Americans representation that is in proportion to their numbers in the Dade County area. Similarly, on the House side, it is undisputed that nine of the eighteen Dade County seats are allocated to "safe" Hispanic districts, reflecting a Hispanic voting population of approximately 50%.

Moreover, even if (as the United States belatedly contends) the appropriate frame of reference were the State of Florida as a whole, the result would be the same, at least with respect to Hispanic citizens. Published census data confirms that a plan designed to afford Hispanic citizens representation in proportion to their numbers would provide for *fewer* than three Hispanic seats in the Senate and for *fewer* than nine Hispanic seats in the House.

While these undisputed facts are themselves sufficient to preclude liability, the District Court's judgment is also premised on a basic misunderstanding of the legal standard for assessing Section 2 vote-dilution challenges to the creation of single-member districts. There is no basis for requiring States to draw the maximum number of theo-

---

Florida Senate Plan do not violate Section 2 of the Voting Rights Act[.]." J.S. App. 5a. In the opinion entered July 17, 1992, which "memorializes and explains the court's rationale for its July 2, 1992 rulings," J.S. App. 24a, the court reached the opposite conclusion, holding that the state senate districts *do* violate Section 2 because the District Plan "dilutes the voting strength of Hispanics" and "African-Americans in Dade County and the surrounding areas." J.S. App. 54a-55a. In its July 17 opinion, however, the court imposed the State Senate Plan as a remedy, apparently on the view that any effort to cure the Section 2 violation would cause another such violation. J.S. App. 66a. For that reason, the ultimate result reached by the court in the Senate case should be affirmed, while the judgment with respect to the House plan should be reversed.

retically possible majority-minority districts without regard to other considerations, such as neutral redistricting criteria or the claims of competing, non-covered groups. Such an approach is facially inconsistent with the so-called "Dole proviso" in Section 2 of the Voting Rights Act, which states expressly that "nothing in this section establishes a right to have members of a protected class elected in numbers to their proportion in the population." 42 U.S.C. § 1973(b). Moreover, a *per se* maximization requirement cannot be squared with this Court's decisions, including *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as the more general premise that a Section 2 challenge requires an assessment of the "totality of the circumstances." 42 U.S.C. § 1973(b).

More fundamentally, requiring legislatures to elevate the maximization of majority-minority districts over all other considerations in redistricting perverts the purpose of the Voting Rights Act, which is to ensure that the "political processes are equally open to minority voters." *Chisom v. Roemer*, 111 S.Ct. 2354, 2363 n. 20 (1991) (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177-79 [hereinafter Senate Report]). Accordingly, this Court should clarify that in the single-member district context a covered group can prevail under Section 2 only where it can affirmatively show that its " 'opportunity to participate in the political process' *and* 'to elect representatives of their choice' has been infringed." *Id.* (quoting 42 U.S.C. § 1973 (emphasis added)). In making that showing, proof of the three *Gingles* factors is a necessary but not sufficient prerequisite to relief. Nor does evidence of actual or expected disproportionality between the group's voting strength and the number of representatives it elects provide an independent basis for a finding of liability. As this Court reaffirmed in *Chisom*—and as the legislative history of the 1982 Amendments plainly demonstrates—the so-called "results" test does not hinge on the predicted *outcome* of elections.

To be sure, in determining whether an infringement has occurred, courts should evaluate the actual or predicted results of elections, including disproportionate outcomes, as a means of determining if the objective evidence "supports an inference" that a covered group has been "shut out, *i.e.*, denied access—not simply to winning offices but to opportunity to participate in the electoral system." [5] But in the end "[t]he ultimate issue to be decided [must be] whether the political processes were equally open." Senate Report at 35, *reprinted in* 1982 U.S. Code Cong. & Admin. News 213. In the event a plaintiff has failed to carry this burden, as is the case here, a State should be free to redistrict without having its plan preempted or "micromanaged" by federal courts.

ARGUMENT

Regardless of whether the "frame of reference" is the Dade County area or the entire State, the Florida plan affords Hispanics representation in proportion to their citizen voting age population. Because proportional representation is a complete defense to a Section 2 claim, the Court need look no further to turn aside the challenge to both the Senate and House plans. Moreover, even were this defense unavailable, the District Court's liability finding would be without legal basis. Because the Dade County area's Hispanic and African-American citizens unquestionably have "an equal opportunity to participate in the political process," as that phrase was employed in Section 2 and the decisions it incorporated, the mere fact that the plan could have provided for marginally more representation provides a facially insufficient basis for invalidating the plan.

---

[5] *Voting Rights Act: Hearings on S.53, S.1761, S.1975, S.1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 810 (1982) (statement of Armand Derfner, head of the Voting Rights Project) [hereinafter Senate Hearings].

I. BECAUSE THE FLORIDA PLAN AFFORDS HISPANICS PROPORTIONAL REPRESENTATION, APPELLANTS' CLAIM FAILS AS A MATTER OF LAW.

As the Court reaffirmed this Term, "only if [an] apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate Section 2; where such an effect has not been demonstrated, Section 2 simply does not speak to the matter." *Voinovich v. Quilter*, 113 S.Ct. 1149, 1156 (1993) (emphasis added).[6] That conclusion, which is compelled by the legislative history,[7] reflects the view

---

[6] A redistricting plan lacking a discriminatory effect can only violate the Voting Rights Act if it is the product of intentional discrimination, a circumstance not present here. *See, e.g., Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992) ("Unless black voters fare poorly compared with white voters in achieving their objectives (the election of candidates they prefer) they have not stated a claim *under section 2(b)*, although proof of intentional discrimination under section 2(a) remains an option.") (emphasis added), *cert. denied*, 61 U.S.L.W. 3771 (U.S. May 17, 1993).

[7] This Court's decisions in *White v. Regester*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 148 (1971), which were explicitly codified in Section 2, Senate Report at 2, *reprinted in* U.S. Code Cong. & Admin. News 177-79, make clear that proof of minority underrepresentation was a necessary but not sufficient condition of a successful vote dilution claim. In *White*, for example, the Court said that, for a plaintiff to sustain a dilution claim, "it is *not enough* that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," 412 U.S. at 765-66 (emphasis added), clearly implying that failure to prove underrepresentation would doom a plaintiff's dilution claim. *See also Whitecomb v. Chavis*, 403 U.S. at 149; *Chapman v. Meier*, 420 U.S. 1, 17 (1971) ("Whether such factors [indicating denial of access to the political process] are present or not, proof of lessening or cancellation of voting strength *must be offered*."). *See* 1 Senate Hearings 819-20 (Prepared Statement of Armand Derfner) ("[A]mended section 2, like *White v. Regester*, applies only in that small category of places where there is no functioning system of politics for minority voters, where there *is* already severe racial division, and where it is simply impossible

expressed by six members of the Court in *Gingles*: "Persistent proportional representation is inconsistent with [the] allegation that the ability of [minority] voters . . . to elect representatives of their choice is not equal to that enjoyed by the white majority." 478 U.S. at 77 (Brennan and White, JJ.).[8] *See also id.* at 104 ("[A]s a general rule, ['consistent and virtually proportional minority electoral'] success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny [minority] voters an equal opportunity to participate in the political process and to elect representatives.") (O'Connor, J., Burger, C.J., Rehnquist, (now C.J.), and Powell, J.).

Under these principles, the district court's July 17, 1992 liability determinations were plainly incorrect. While the United States devotes much energy to its contention that the appropriate "frame of reference" for assessing proportionality is the State of Florida rather than the Dade County area, the distinction is entirely ephemeral on these facts. It is undisputed that three of the seven Senate Districts in the Dade County area (43%) will contain majority Hispanic voting age populations, and one of the seven (approximately 15%) will contain a majority African-American voting age population.[9] Be-

for minority voters to have any significant *opportunity* under the election system as it is . . . ."); *accord, e.g., id.* at 287 (Memoradum of Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights).

[8] *Accord Nash v. Blunt*, 797 F. Supp. 1488, 1497-98 (W.D. Mo. 1992), *aff'd mem.*, 113 S.Ct. 1509 (1993) (No. 92-1249) (proof of "persistent proportional representation should defeat a Section 2 vote dilution claim"). *See also* Motion of the United States to Affirm in Part and Vacate in Part at 11, *Wetherell v. De Grandy* (No. 92-519) (endorsing same conclusion).

[9] In addition, it is also undisputed that another Senate district has an African-American voting age population of more than 33% and that, in the 1992 election, an African-American candidate of choice was indeed elected in that "influence" district.

cause 45% of the voting age population in the Dade County area is Hispanic and approximately 15% is African-American, these uncontested facts should end the matter—especially in light of the litigation position taken by the plaintiffs below.[10] *See, e.g.*, Tr. I, 52 (limiting vote dilution claims to Dade County). The relevant numbers on the House side are equally telling. Nine of the twenty districts in the Dade County area will contain majority Hispanic voting age populations, each of the nine seats will permit the Hispanic population to participate effectively in the political process, and approximately 45% of the voting age population in the Dade County area is Hispanic.

Even if the appropriate focus were the State of Florida as a whole, the outcome would be the same. Notwithstanding the United States' peculiar (and legally insupportable) objection to reliance on published Census data, it concedes that "Hispanics constitute 7.15% of the citizen voting age population of Florida" and that "if a plan has been designed to afford Hispanics representation in proportion to their numbers in the citizen voting age population, it would apparently have eight or nine Hispanic seats." (Nine out of 120 total House seats or 7.5%). Motion of the United States to Affirm in Part and Vacate in Part at 14. *Wetherell v. De Grandy* (No. 92-519).[11]

[10] Because a decennial reapportionment plan is, by definition, "new," evaluating proportional representation in this context is a matter of prediction rather than history. While the case thus differs from *Gingles* in this minor respect, the distinction is without significance. At no point have appellants contested the conclusion that the majority-minority districts in the Florida plan are all "safe" minority seats. Moreover, the historical experience also supports the same result: in the 1990 elections, three Hispanic and one African-American State Senators were elected from the Dade County area.

[11] Despite this concession, the United States asks this Court to affirm the District Court's liability determination on the grounds that Appellants failed at trial to introduce then-unavailable Census

Because, for the House side, the State's plan *does* provide for nine Hispanic seats, this concession of state-wide proportional representation is determinative. Similarly, because on the Senate side at least three of the 40 state-wide seats (7.5%) are Hispanic, a finding of proportional representation is also inescapable.

In this regard, as the United States again concedes, there is no basis for any suggestion that the relevant measure is the voting age *population* as distinct from the number of voting age *citizens*. *See* Mem. for The United States in Opp. to App. For Stay at 11, *Wetherell v. De Grandy*, No. A-32 (U.S. July 14, 1992). The Voting Rights Act expressly states that it is intended to protect the rights of "*citizens*" and to guarantee that minority voters do not have less opportunity than other "*members of the electorate*" to "elect representatives" of their choice. 42 U.S.C. § 1973 (emphasis added). That clear language is reflected in numerous decisions of this Court, which have invariably considered "voters" the relevant group for reapportionment purposes. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 746-748 (1973) (stating that "'census persons' are not voters" and therefore "total population figures derived from the federal Census" need not be used as the standard); *see also Burns v. Richardson*, 384 U.S. 73, 91-93 (1966).[12] Accordingly, because

---

data showing statewide citizenship levels. This request ignores Federal Rule of Evidence 201, which authorizes judicial notice of a fact "at any stage of the proceeding." The data is properly before this Court. Fed. R. Ev. 201(f).

[12] Put another way, for purposes of the analysis of voting strength, non-citizens are equivalent to persons too young to vote, and should be treated in the same fashion. *See City of Rome v. United States*, 446 U.S. 156, 186 n.22 (1980) "[c]urrent voting-age population data" are probative because they "indicate the electoral potential of the minority community"); *see also Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1161-1162 (5th Cir. 1981). To include persons ineligible to vote on account of non-

the Florida plan provides for proportional representation of Florida's Hispanic citizens who are eligible to vote, the District Court's liability determinations were incorrect.

II. UNDER THE CONTROLLING LEGAL STANDARD, APPELLANTS HAVE NOT DEMONSTRATED, AND COULD NOT DEMONSTRATE, A VALID SECTION 2 CLAIM.

The District Court clearly erred in premising its *liability* determination on the assumption that the State failed to maximize the number of Hispanic and African American districts. Under the correct legal standard, the plaintiffs below have not demonstrated—nor could they demonstrate—a valid claim under Section 2 of the Voting Rights Act.

A. Section 2 Does Not Require a State Legislature to Maximize the Number of Majority-Minority Districts.

The critical issue in this case is not whether *more* effective minority districts *could* have been created in Dade County, but whether Section 2 *requires* that such districts be drawn. The lower court believed that, once political cohesion and racially polarized voting have been shown, the failure to draw the maximum number of minority districts in a single-member district reapportionment plan is tantamount to a violation of Section 2. For a host of reasons, this analysis is incorrect.

As a threshold matter, the approach adopted by the District Court constitutes precisely the sort of "per se" approach this Court has repeatedly condemned in Section 2 cases. *See, e.g., Voinovich v. Ouilter*, 113 S. Ct. at 1156 ("[E]lectoral devices . . . may not be considered

---

citizenship in the statistical pool would significantly overstate the degree of Hispanic electoral potential. *See Burns v. Richardson*, 384 U.S. 73, 92-93 (1966).

per se violative of Section 2.") (citations and quotations omitted). *See also id.* at 1157 ("The *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim.").

The legal and practical basis for eschewing categorical rules in this area is not difficult to discern. Any other approach would foreclose States from considering the wide array of interests and policies that this Court has recognized may be accommodated when a State formulates an acceptable reapportionment plan. These considerations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent" office holders, *Karcher v. Daggert,* 462 U.S. 725, 740 (1983), as well as the fair allocation of political power among a State's diverse political, ethnic, and racial communities. *See United Jewish Organizations v. Carey,* 430 U.S. 144, 167 (1977); *Gaffney v. Cummings,* 412 U.S. at 752-53. Such considerations, far from being merely unavoidable realities that must grudgingly be left to the States, are basic to a State's sovereignty—as explicitly recognized in Article I, Sec. 2 of the U.S. Constitution. Any rule that categorically deprived States of the power to weigh these vital matters would itself be constitutionally suspect.[18]

Put somewhat differently, a *per se* maximization rule would *require* Florida to focus exclusively on the treatment of one group—Hispanics—and to ignore other legitimate interests and constituencies. As this case illustrates well, such a requirement is especially unworkable in a multi-ethnic area like Dade County, which contains a significant number of individuals from more than one covered group. Unless the claims of the two (or more) protected classes are evaluated simultaneously—and are thereby, by definition, not maximized—the voting strength of one protected group will always be expanded at the expense of the other. This approach led the lower court to the anomalous conclusion that both Hispanic and African-American plaintiffs had stated Section 2 violations—but that neither were remediable because the allocation of an additional Senate district to either group would result in the loss of a district by the other group. Consequently, the District Court concluded that the reapportionment scheme it deemed the best available nevertheless violated Section 2.

[18] Among the potential costs of maximizing minority officeholding at the cost of all other considerations is the danger that political integration may be inhibited by categorizing individuals for political purposes along racial lines and sanctioning group membership as a qualification for office. *See* 1 Senate Hearings 1361 (prepared statement of James Blumstein) (describing such categorization as a racial "piece-of-the action approach"). It is unclear whether such balkanization redounds to the benefits of minorities, *United States v. Board of Supervisors,* 571 F.2d 951, 956 (5th Cir. 1978); in any event, it is not required by the Act, which seeks only to reduce barriers to entry into the political process.

An approach that leads to such incongruous results simply cannot be justified under the plain terms of the Act. To the contrary, a maximization requirement would necessarily vitiate Congress's mandate that a court consider the "totality of the circumstances" when evaluating a Section 2 challenge. 42 U.S.C. § 1973. Reflecting the statutory language, the legislative history of the 1982 Amendments enumerated a number of factors that must be assessed in deciding if the Act has been violated. Senate Report at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News 205-07. *See Gingles,* 478 U.S. at 44-45 (acknowledging need for careful consideration of these factors). Contrary to Congress' express intent, the District Court's maximization standard renders this entire analysis irrelevant.

Furthermore, the lower court's standard cannot be reconciled with the so-called "Dole proviso" "[t]hat nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their propor-

tion in the population." 42 U.S.C. § 1973(b). As a decision summarily affirmed by this Court only last month observes, the Dole proviso is determinative in another respect as well. The proviso's clear mandate precludes a finding that "Congress intended the Act to require maximum representation . . . [because] [t]he converse of such a requirement would be a continuing duty to minimize representation by majority groups—a concept probably more controversial than proportional representation, which . . . was specifically rejected by Congress." *Nash v. Blunt*, 797 F. Supp. at 1496.

This point is aptly illustrated by the House appellants' hypothetical involving a 10-district jurisdiction with 100 voters per district. Under such circumstances, a group comprising 50% of the population could be given control of up to nine of the ten districts, so long as their geographic dispersion was such that nine districts could be drawn containing 51 members of the group ($9 \times 51 = 459$). Were Section 2 construed to require maximization, state legislatures would have no choice other than to ensure that majority groups were afforded the *least* representation possible—which, quite plainly, was not the purpose of the Act.

As this Court has explained in a related context,

> To draw district lines to maximize the representation of [a particular group] would require creating as many safe seats for each [such group] as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice.

Davis v. Bandemer, 478 U.S. at 130-131. There is no warrant in the Voting Rights Act for mandating that non-covered groups be placed, to the extent possible, in districts where they are denied any realistic opportunity to elect "a representative of choice."

Not surprisingly in light of the statutory language, the decisions construing it are uniformly inconsistent with a maximization requirement. *Gingles* itself, which focused on the "totality of circumstances" is, of course, directly contrary to the District Court's approach. Other decisions have rejected the lower court's analysis in even more categorical terms. *See, e.g., Nash v. Blunt*, 797 F. Supp. at 1497 (proving that "more minority-dominated districts could have been drawn" is not a substitute for the *Gingles* analysis).

Similarly, in both of the cases that were "codified" into law by Section 2, this Court rejected the view that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute a single-member district." *Whitcomb v. Chavis*, 403 U.S. at 156. *See also White v. Regester*, 412 U.S. 755, 758 (1973). Instead, the Court required "that there be proof that the complaining minority 'had less opportunity . . . to participate in the political processes and to elect legislators of their choice.'" *Davis v. Bandemer*, 478 U.S. at 136 (quoting *Whitcomb*, 403 U.S. at 149). Thus, both decisions "clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.* at 130 (citing *Whitcomb* and *White*).

Finally, as Justice O'Connor's concurrence in *Davis v. Bandemer*, 478 U.S. at 159, recognized, a "preference for proportionality" such as that adopted by the District Court there challenges "the legitimacy of districting itself . . . [as] the voting strength of less evenly distributed groups will invariably be diminished by districting as compared to at-large proportional systems for electing representatives." Yet such a result would directly flout

this Court's oft-stated preference for single-member districts over at-large districts.[14] As such, "it would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district." *Growe*, 113 S.Ct. at 1076. That, however, is precisely the hurdle the District Court's standard would raise.

For all of these reasons, the District Court's maximization requirement constituted plain error. Thus, the only remaining question is whether, on this record, the plaintiffs below could make out a Section 2 violation under the correct legal standard. As we now show, that question can only be answered in the negative.

B. Appellants' Failure to Demonstrate That They Were Denied an Equal Opportunity to Participate In the Political Process Bars Their Section 2 Claim.

While incorrect on its own terms, the District Court's maximization requirement betrays a more fundamental misunderstanding of the requirements of Section 2 of the Voting Rights Act. By predicating its entire analysis on the expected *outcomes* of elections under the challenged plan, it ignored the central issue under Section 2: whether members of the plaintiff class "have less *opportunity* than other members of the electorate to *participate in the electoral process.*" 42 U.S.C. § 1973(b) (emphasis added). As the statutory language, the legislative history, and a uniform body of this Court's decisions make clear, that inquiry—which turns on "access-related," as distinct from "outcome-predictive" considerations—is an independent prerequisite to relief.

---

[14] *See, e.g., Growe*, 113 S.Ct. at 1076 ("We have . . . stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts . . . which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment.") (citations omitted).

To be sure, a substantial disparity between minority population and the number of representatives that minority group may reasonably be expected to elect (assuming bloc voting is proven) may provide evidence that members of the minority are denied meaningful access to the political process if candidates preferred by the minority group are consistently defeated at the polls. But where, as here, (1) there is no evidence to suggest that plaintiffs are denied an opportunity to participate in the electoral process; (2) there is (to say the least) no substantial downward departure from proportionality; and (3) the record suggests that the redistrictng plan was based on rational, race-neutral criteria and developed pursuant to a good faith effort to comply with the Voting Rights Act, the analysis is at an end. In such circumstances, it is not the proper function of a federal court to subordinate a State's considered judgment to its own vision of electoral justice.

1. *Proof that a Covered Class is Denied An Equal Opportunity to Participate In The Electoral Process is a Prerequisite to Relief Under Section 2.*

All parties agree that the three "preconditions" set forth in *Thornburg v. Gingles, supra*, provide the starting point for the analysis in this case. *Voinovich*, 113 S.Ct. at 1157 (suggesting that *Gingles* factors apply in assessing single-member districts under Section 2); *Growe*, 113 S.Ct. at 1076 (same). Where appellees and the United States go astray, however, is in their tacit assumption that the *Gingles* factors constitute the end point as well. As the decisions in both *Voinovich* and *Growe* make clear, the *Gingles* factors are merely threshold elements of the plaintiff's *prima facie* case—necessary, but not sufficient conditions to proving liability.

That conclusion finds ample support in both the language of Section 2 and the reasoning of *Gingles*. Section 2

provides that the ultimate liability determination turns on "the totality of circumstances"—a universe of considerations that, by definition, is broader than the three preconditions identified in *Gingles*. Moreover, close examination of the preconditions themselves confirms their limited role in the overall inquiry. As the Court explained in *Growe*, "geographical compactness," minority "political cohesion," and "majority bloc voting" serve to identify situations where an alternative districting plan, as a practical matter, might *rectify* a plan that operates to deny a minority an equal electoral opportunity to elect representatives of choice. 113 S.Ct. at 1076. They, however, are only marginally useful in identifying whether a challenged plan *in fact* deprives a minority of its electoral rights. And they have virtually no bearing on whether members of the covered class "have less opportunity than other members of the electorate to participate in the electoral process." 42 U.S.C. § 1973(b).

Indeed, it is precisely that statutory predicate to liability that the District Court's analysis impermissibly submerges. To prevail in a Section 2 claim, a plaintiff class must demonstrate that it has "less opportunity than other members of the electorate to participate in the electoral process *and* to elect representatives of choice." *Id.* (emphasis added). Thus, "the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, *it can also be said that the members of the protected class have less opportunity to participate in the political process.*" *Chisom v. Roemer*, 111 S.Ct. at 2371 (emphasis added). As the Court further explained in *Chisom*, "It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.'" *Id.*

By focusing exclusively on the number of "safe" Hispanic and African-American districts the various plans would create, the District Court simply ignored the "process" part of the inquiry at the expense of its overarching

concern with the sheer "number" of representatives Hispanics or African-Americans might expect to elect. This Court's parsing of the statutory language in *Chisom* makes plain that this approach is clear error. The pertinent question under the "process" component of Section 2 has nothing at all to do with outcome.[15] The question instead is "whether a particular group has been . . . denied its chance to effectively *influence* the political process." *Davis v. Bandemer*, 478 U.S. at 132-133 (emphasis added). Or as the Court phrased it in the decision expressly "codified" by Congress in the 1982 Amendments, "[T]he mere fact that one interest group or another . . . found itself outvoted and without legislative seats of its own provides no basis for invoking [a remedy] where, as here, there is no indication that this segment of the population is *being denied access to the political system.*" *Whitcomb v. Chavis*, 403 U.S. at 154-55 (emphasis added).

The District Court's error is traceable to a common, but erroneous, misunderstanding of the so-called "results" test adopted pursuant to the 1982 Amendments to the Act. It is certainly true that one of the primary purposes of the 1982 Amendments to the Act was to eliminate the requirement that a plaintiff document discriminatory intent in order to establish a Section 2 violation. Contrary to its somewhat inapt name, however, the "results" inquiry that supplanted the intent requirement does not authorize courts to base Section 2 liability determinations on the predicated outcome of elections. Instead, the purpose of the amendment was merely to substitute an "objective" analysis for a "subjective" one. In those extreme circumstances where a gross disparity exists between the

---

[15] And, indeed, even under the second part of the inquiry, the Dole proviso precludes according the outcome (or expected outcome) of elections controlling weight—at least insofar as the plaintiff class is contending that it is entitled to proportional representation.

expected outcomes of the redistricting process and the covered group's voting strength, the objective evidence will undoubtedly show that the covered group had been impermissibly excluded from the political process—and, indeed, that degree of disproportionality may be strong evidence of such exclusion. But in the end, "[t]he ultimate issue to be decided [must be] whether the political processes were equally open." Senate Report at 35, *reprinted* in 1982 U.S. Code Cong. & Admin. News 213.

An examination of the legislative history of the 1982 Amendments confirms this interpretation. Proponents of the results test chiefly argued that the Court's holding in the *City of Mobile v. Bolden*, 446 U.S. 55 (1982) insulated discriminatory practices from review because of the difficulty of obtaining evidence regarding the subjective motivations of legislators, especially when the practices in question were adopted long ago.[16] These supporters of the results test proposed that the analysis be based on the various so-called "objective" factors identified in *White v. Regester* and pre-*City of Mobile* lower court cases applying that standard. Critics of the results test agreed, in essence, that a finding of unlawful vote dilution could and should be made based on the objective evidence but were concerned with, among other things, the potentially limitless scope of the test.[17]

---

[16] *See, e.g.*, 1 Senate Hearings 199 (statement of Sen. Mathias); *id.* at 256, 265 (testimony of Benjamin L. Hooks, Exec. Dir. NAACP); *id.* at 290-91 (testimony of Vilma Martinez, Pres. MALDEF); *id.* at 813-19 (prepared statement of Armand Derfner). Another criticism was that the intent test created racial tensions by requiring a plaintiff to charge that a person was a racist before a violation could be established. *Id.* at 1181 (prepared statement of Arthur Fleming, Chairman, U.S. Comm'n on Civil Rights).

[17] The Subcommittee's Report contains a complete discussion of the results test. *See* Senate Report at 108-11, 127-58, 169-73, *reprinted in* 1982 U.S. Code Cong. & Admin. News 279-283, 298-331, 342-347.

Backers of the results test repeatedly assured those opposing it that the test was not a mandate for proportional representation,[18] and that it was simply to ensure that minorities were not effectively 'shut out' of the political process.[19] These proponents further contended that, given the heavy burden it placed on minority plaintiffs, the test would invalidate only those electoral practices that denied minorities an equal opportunity to partcipiate in the political process.[20] As Armand Derfner, head of the Voting Rights Project, put it, the "goal" of amended Section 2 "is to create an opportunity—nothing more than an opportunity—to participate in the political system." 1 Senate Hearings 821 (prepared statement).[21]

---

[18] *See, e.g.*, 1 Senate Hearings 220 (prepared statement of Senator Kennedy) ("The courts have made clear that under the standard in our bill there is no right to a quota or to proportional representation, even in the context of at-large elections"); *id.* at 246 (Benjamin L. Hooks, Exec. Dir., NAACP); *id.* at 283, 287 (memorandum of Ralph G. Neas, Exec. Dir., Leadership Conf. of Civil Rights); *id.* at 796 (testimony of Armand Derfner, Voting Rights Project).

[19] 1 Senate Hearings 810 (prepared statement of Armand Derfner); *see also, e.g., id.* at 223 (prepared statement of Sen. Kennedy); *id.* at 626 (testimony of David Walbert).

[20] *See, e.g.*, 1 Senate Hearings 201 (testimony of Sen. Mathias); *id.* at 223 (prepared statement of Sen. Kennedy) ("effectively shut out of a fair opportunity [to] participate in the election"); *id.* at 810, 819-820 (prepared statement of Armand Derfner).

[21] Other supporters of the results standard made the same point. *See, e.g.*, 1 Senate Hearings 305 (prepared statement of Vilma Martinez, President, MALDEF) ("The issue then, is not proportional representation, but equal access to the political process"); *id.* at 372 (Laughlin McDonald, Southern Regional Dir., ACLU) ("What those [pre-*City of Mobile*] cases do is establish equality of access"). *See also id.* at 223 (prepared statement of Sen. Kennedy); *id.* at 275-76 (prepared statement of Benjamin L. Hooks, Pres. NAACP); *id.* at 283, 286-89 (memorandum from Ralph G. Neas, Exec. Dir., Leadership Conf. on Civil Rights); *id.* at 706 (memorandum from Frank R. Parker, Lawyer's Comm. for Civil Rights Under Law).

Senator Dole broke the deadlock between these two opposing forces by offering a compromise version of Section 2. That compromise introduced "additional language" incorporated from *White v. Regester* "delineating what legal standard should apply under the results test and clarifying that [this test] is not a mandate for proportional representation" 2 Senate Hearings 60 (statement of Senator Dole); *id.* at 58-59 (Additional views of Senator Dole). As Senator Dole put it, because his version of amended Section 2 "focus[es] on access to the process, not election results," 2 Senate Hearings 62, the question to be answered is "not whether [minorities] have achieved proportional election results," but "whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process." *Id.* at 60.

The legislative history makes clear that the Dole compromise embodied three areas of consensus. First, there was widespread agreement that direct evidence of intent to discriminate should not be necessary to establish a violation under Section 2. Rather, a claim of discriminatory vote dilution could be made based on objective factors. Second, a consensus emerged against allowing Section 2 claims to be based on a group's inability to achieve representation in proportion to its population within the jurisdiction. Instead, all agreed that proof of minority underrepresentation was a necessary but not a sufficient condition of a successful vote dilution claim, as the Court's decisions in *White* and *Whitcomb* had held. Third, it was understood that the concepts of unconstitutional vote dilution developed by this Court in *White* and *Whitcomb* and as applied in the lower courts prior to the *City of Mobile* should govern amended Section 2 cases.

These pre-*City of Mobile* decisions bear out the contention that Section 2 has been violated only where the minority group can prove that it "has essentially been shut out of the political process." *Davis v. Bandemer,*

478 U.S. at 139; *id.* at 151-52 (O'Connor, J., concurring). Thus, in *Whitcomb v. Chavis,* 403 U.S. at 148-149, the Court found "major deficiencies" in an approach that found an apportionment plan impermissible "because the proportion of legislators with residences in the ghetto elected from 1960 to 1968 was less than the ghetto's proportion of the population, less than the proportion legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the county consisted of single-member districts."

Instead of focusing on the outcome of elections, the Court carefully examined the record to determine whether African-Americans had, in fact, been denied access to the political processes. It concluded:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Whitcomb v. Chavis, 403 U.S. at 149-50.

Similarly, in *White v. Regester,* the Court refused to rest on the outcomes of elections but instead found that the plaintiffs had carried their burden of "produc[ing] evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766.

The plaintiffs successfully bore this burden by showing that the "white-dominated organization" that was "in

effective control of [the] Democratic Party candidate slating in Dallas County . . . did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community." *White v. Regester*, 412 U.S. at 766-67. They further established that "as recently as 1970 the [white Democratic organization] was relying upon 'racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community' " and that " 'the black community has been effectively excluded from participation in the Democratic primary process.' " *Id.* at 767. Accordingly, the Supreme Court sustained the district court's conclusion that the African-American community "was therefore generally not permitted to enter the political process in a reliable and meaningful manner." *Id.*[22]

Thus, the thrust of the cases endorsed in the legislative history was a careful analysis of whether objective facts indicated that the minority group had access to the political process—not whether, or to what degree, it was likely to prevail. *See, e.g., Dove v. Moore*, 539 F.2d 1152, 1155 (8th Cir. 1976) (upholding at-large system as lawful despite the fact that only one black alderman had ever been elected because "the record demonstrates that [blacks] play an active and significant political role in city politics"); *Black Voters v. McDonough*, 565 F.2d 1, 3 n.3, 6 (1977) (finding no dilution even though no blacks had ever been elected to School Board because "[b]lack candidates have carried Boston in other elections" and "a number of factors found by case law to minimize minority votes are missing from the record presented below"); *Hendrix v. Joseph*, 559 F.2d 1265, 1268

[22] This interpretation of *Whitcomb* and *White* is in accord with this Court's view of those cases. *See, e.g., Gingles*, 478 U.S. at 98 ("The 'results' test as reflected in *Whitcomb* and *White* requires an inquiry into the extent of the minority group's opportunities to participate in the political processes.") (O'Connor, J.).

(5th Cir. 1977) (finding no dilution because "[t]he very fact that there have been [minority] candidacies is 'suggestive of the fact that there is minority access to the nomination process,' " (quoting *David v. Garrison*, 553 F.2d at 929)); *David v. Garrison*, 553 F.2d 923, 930 (5th Cir. 1977) (reversing finding of dilution even though "there had been no blacks elected to any city or county office" because "there were no findings that, because of past discrimination, present black participation in elections is less than effective.").

This focus on access does not mean, of course, that a malevolent majority can simply pay lip services to a covered minority and claim that the minority group has been afforded access to the electoral process. These cases clearly establish that minorities have a right to participate fully in a political process in which they face no "built-in bias." Moreover, access was defined to mean not only the right to register and vote, but also the ability to join a political party, to participate in its affairs in a meaningful manner, and to become a candidate. Thus, while plaintiffs bear a substantial burden, it is hardly insurmountable, as cases like *White v. Regester* confirm.

Taken together, the statutory language, the decisions construing it, and the legislative history yield the following conclusions. A covered group asserting a Section 2 challenge to a single member districting plan must—in addition to satisfying the three *Gingles* preconditions —"demonstrate that its members have less opportunity than other members of the electorate to participate in the electoral process." 42 U.S.C. § 1973(b). Quite apart from the number of "representatives of choice" the group can expect to elect, it must show that it has been denied meaningful access to the process through which representatives are nominated and elected. While a substantial downward departure from actual (or predicted) proportional representation may serve as evidentiary support for such denial, more direct evidence of exclusion

may be found in the form of barriers to the nomination process or other limitations (*de facto* or otherwise) on minority candidacies, voting, or registration.[23] In the absence of such a showing, a state plan premised on neutral (albeit political) redistricting criteria should be accorded substantial deference. That deference should be at its zenith where, as here, the State has solicited the input of affected minorities and consciously crafted its plan in a good faith effort to meet its responsibilities under the Voting Rights Act.

2. *Appellants Have Not Demonstrated that the Florida Plan Denied Them an Equal Opportunity to Participate in the Electoral Process.*

Application of these principles in the instant case is straightforward. The District Court's conclusory assertion to one side, the record is devoid of any substantial evidence that Hispanics or African-Americans in south Florida (or the State as a whole) have "less opportunity than other members of the electorate to participate in the electoral process." 42 U.S.C. § 1973(b). To the contrary, the evidence supports precisely the opposite conclusion.

Far from being "shut out" of the process, Hispanics and African-Americans have enjoyed great success at all levels of government. Thus, for example, the previous governor of the State was of Hispanic origin, as are the Mayors of Miami and Hialeah. In addition, by the end of the 1980's seven Hispanics from Dade County held seats in the Florida House of Representatives, and two in the State Senate. Yet another was elected to the U.S. Congress from Dade County. Currently, Hispanics constitute a majority of the city commissioners in Miami, Hialeah, Sweetwater, and West Miami. Numerous others serve on the Dade County School Board and other county offices.

---

[23] *See, e.g.*, A. Thernstrom, *Whose Votes Count?, Affirmative Action and Minority Voting Rights*, 197-231 (1987).

Similarly, by the end of the 1980s, for example, four African-Americans from Dade County held seats in the Florida House of Representatives, and another held a seat in the State Senate. Another African-American from Dade County was elected to the United States Congress in the 1992 election. African-Americans also serve as city commissioners in six different Dade County cities and numerous others serve on the Dade County School Board in other county offices.

To be sure, episodic electoral success by members of a covered group is not a complete answer to a Section 2 claim. Nonetheless, this impressive track record is utterly inconsistent with any suggestion that Hispanics or African-Americans are denied meaningful access to the political process.

That conclusion finds further support in the manner in which the Florida legislature went about the business of reapportionment. Acutely aware of its responsibilities under the Voting Rights Act, it endeavored to create a plan that would protect the rights of Florida's minority populations, while achieving a fair allocation of political power among all of the State's constituencies.[24] Towards that end, members of the Cuban and Black Caucuses served on the responsible committees and played an active role in every step of the process. Moreover, in the recent past the State had abandoned its use of multi-member districts for the express purpose of eliminating the risk of unfair dilution of the voting strength of its minority communities. *See In re Reapportionment Law*, 414 So. 2d 1040, 1045 (Fla. 1982).

Nor, of couse, can an inference of undue exclusion be predicated on the expected number of "safe" Hispanic or African-American districts under the challenged plan. As noted, it is undisputed that Hispanic and African-American citizens of both Dade County and the State as a

---

[24] Testimony of Peter Wallace, Tr. VII, 164.

whole can be expected to elect representatives in proportion to their voting strength. But even if that were not the case, hardly do the numbers reflect the kind of gross disparity that might evidence diminished access to the electoral process.

Viewed against this backdrop, the contention that Hispanics and African-Americans are denied the "opportunity" to "participate in the electoral process" simply rings hollow. Florida's efforts to accommodate the immensely complex social, political, and ethnic interests within its borders in some respects may be imperfect—as is always the case given the "zero sum" nature of the enterprise. But to condemn its plan as a violation of Section 2 essentially on the grounds that the District Court preferred a marginally different approach stretches that provision well beyond its intended scope. Because such an approach is inconsistent with both the Act and basic principles of federalism, *Amici* respectfully urge that the decision in the Senate case be affirmed and the decision in the House case be reversed.

CONCLUSION

For the foregoing reasons, the decision below in the Senate case should be affirmed and the decision below in the House case should be reversed.

Respectfully submitted,

CHRISTOPHER D. CERF
(Counsel of Record)
DANIEL E. TROY
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

June 1, 1993